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In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL., PETITIONERS

v.

KERR-MCGEE OIL AND GAS CORP.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under Section 303 of the Outer Continental Shelf Deep Water Royalty Relief Act (Royalty Relief Act), 43 U.S.C. 1337(a)(1)(H), the Secretary of the Interior is authorized to suspend royalty payments to the United States on certain oil and gas leases. Such suspensions are to be set on the basis of "a period, volume, or value of production determined by the Secretary," but they "may vary" (such that royalty payments are reinstated) if the price of oil or gas exceeds a certain threshold. Section 304 of the Royalty Relief Act (43 U.S.C. 1337 note entitled "Lease Sales") governs certain leases issued between 1996 and 2000, and it requires the use of Section 303's bidding system "except that" it specifies certain volumes at which "suspension of royalties shall be set." The question presented is:

Whether Section 304 of the Royalty Relief Act authorizes the Secretary of the Interior to vary the suspension of royalties, so as to collect royalties on oil or gas produced when the price of oil or gas exceeds thresholds specified in the lease, notwithstanding statutorily designated suspension volumes.

PARTIES TO THE PROCEEDING

In addition to the parties identified in the caption, Ned Farquhar, Acting Assistant Secretary for Land and Minerals Management, United States Department of the Interior, is the successor in office to C. Stephen Allred, who was, in his official capacity, an appellant in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States Department of the Interior and its Acting Assistant Secretary for Land and Minerals Management, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-11a) is reported at 554 F.3d 1082. The opinion of the district court (App., *infra*, 12a-22a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 2009. A petition for rehearing was denied

on April 14, 2009 (App., *infra*, 41a-42a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are reprinted in an appendix to this petition. App., *infra*, 43a-63a.

STATEMENT

1. a. The Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. 1331 *et seq.*, grants the Secretary of the Interior (Secretary) the authority to issue and administer leases on the outer Continental Shelf to companies seeking to produce oil and gas from the seabed. The Secretary is charged with administering OCSLA's leasing provisions and also with "prescib[ing] such rules and regulations as may be necessary to carry out" the statute. 43 U.S.C. 1334(a). Oil and gas leases on the outer Continental Shelf are generally issued on the basis of competitive bidding, with leases issued to the highest bidder. 43 U.S.C. 1337(a)(1). Under the terms of OCSLA and the leases, a lessee typically obtains the right to produce and sell oil and gas in exchange for agreeing to pay royalties to the United States at a specified percentage of the amount or value of production saved, removed, or sold from the lease. *Ibid.*; 43 U.S.C. 1337(b)(3). The statute requires leasing activities "to assure receipt of fair market value for the lands leased and the rights conveyed by the Federal Government." 43 U.S.C. 1344(a)(4).

b. On November 28, 1995, Congress amended OCSLA by enacting the Outer Continental Shelf Deep Water Royalty Relief Act (Royalty Relief Act or RRA), Pub. L. No. 104-58, 109 Stat. 563. The Royalty Relief Act allows the Secretary, under certain conditions, to suspend the payment of royalties to the United States

by oil and gas lessees. As relevant here, the statute addresses royalty relief for three different circumstances: (1) for new production of oil and gas under pre-existing leases for deepwater tracts in certain specified parts of the Gulf of Mexico, RRA § 302, 109 Stat. 563-565 (43 U.S.C. 1337(a)(3)(C)); (2) for production of oil and gas under new leases for OCSLA lands generally, § 303, 109 Stat. 565 (43 U.S.C. 1337(a)(1)(H)); and (3) for production of oil and gas under new leases issued during the five-year period immediately following the enactment of the Royalty Relief Act for deepwater tracts in the same parts of the Gulf of Mexico noted above, § 304, 109 Stat. 565-566 (43 U.S.C. 1337 note entitled "Lease Sales").

With regard to the first category of royalty relief—for newly produced oil and gas under pre-existing leases on deepwater tracts in specified parts of the Gulf of Mexico—Congress provided that, if the Secretary found that new production under a lease would not be economically viable without relief from royalties, the Secretary could then "determine the volume of production from the lease or unit on which no royalties would be due in order to make such new production economically viable; except that for new production * * *, in no case will that volume be less than" one of three specified amounts (depending on the depth of the relevant tract). 43 U.S.C. 1337(a)(3)(C)(ii). Notwithstanding those minimum production volumes (beneath which royalties would generally not be due), Congress further provided that, even "[d]uring the production" of those minimum volumes, such oil and gas would remain "subject to royalties at the lease stipulated royalty rate" in any year during which the "arithmetic average of the closing prices on the New York Mercantile Exchange" for oil or gas exceeded certain specified price thresholds—$28.00

per barrel of oil and $3.50 per million British thermal units for natural gas, adjusted for inflation. 43 U.S.C. 1337(a)(3)(C)(v) and (vi). Thus, Congress established a system for pre-existing deepwater leases that made royalty relief generally available when new production remained below certain volumes, but that still required royalties to be paid on production below those volumes in years when the price of oil or gas exceeded certain thresholds.[1]

With regard to the second category of royalty relief—for oil and gas produced under new OCSLA leases generally—Section 303 of the Royalty Relief Act established that the Secretary could opt to use a new form of bidding system for such leases, as an alternative to one of the seven others already available under OCSLA.[2] Under that new system, bidding would be based on a

> cash bonus bid with royalty at no less than 12 and ½ per centum fixed by the Secretary in amount or value of production saved, removed, or sold, and with suspension of royalties for a period, volume, or value of production determined by the Secretary, which suspensions may vary based on the price of production from the lease.

43 U.S.C. 1337(a)(1)(H). Thus, under that system, even though royalties may be suspended under a new lease

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[1] Section 302 also authorized (but did not require) the Secretary to reduce or eliminate the royalty or net profit share specified in leases in roughly the same specified parts of the Gulf of Mexico in order to promote development of increased production or to encourage production of marginal resources. See 43 U.S.C. 1337(a)(3)(B). That separate authorization is not at issue here.

[2] See 43 U.S.C. 1337(a)(1)(A)-(G) (enumerating the other available bidding systems).

"for a period, volume, or value of production," the Secretary may further provide that the suspension, once prescribed, would then "vary based on" price thresholds determined by the Secretary. The Department of the Interior (Department) has codified in regulations its authority to "vary" royalty suspensions for such leases "based on the price of production." 30 C.F.R. 260.110(g).

This case involves the third category of royalty relief—for new oil and gas leases on deepwater tracts in the same specified parts of the Gulf of Mexico that were issued in the five years after November 28, 1995. In Section 304 of the Royalty Relief Act, Congress required those leases to be sold on the basis of the new bidding system it had created in Section 303. RRA § 304, 109 Stat. 565-566 (43 U.S.C. 1337 note entitled "Lease Sales"). More specifically, Section 304 provides as follows:

> For all tracts located in water depths of 200 meters or greater in [specified parts of the Gulf of Mexico], any lease sale within five years of the date of enactment of this title [November 28, 1995], shall use the bidding system authorized in section 8(a)(1)(H) of the Outer Continental Shelf Lands Act, as amended by this title [43 U.S.C. 1337(a)(1)(H)], except that suspension of royalties shall be set at a volume of not less than the following:
>
> (1) 17.5 million barrels of oil equivalent for leases in water depths of 200 to 400 meters;
>
> (2) 52.5 million barrels of oil equivalent for leases in 400 to 800 meters of water; and
>
> (3) 87.5 million barrels of oil equivalent for leases in water depths greater than 800 meters.

RRA § 304, 109 Stat. 565-566 (43 U.S.C. 1337 note entitled "Lease Sales").[3] Although Section 304 addresses the minimum volume at which royalty suspensions are to be "set," it is silent with respect to Section 303's further authorization for the Secretary to "vary" a suspension if the price of oil or gas exceeds certain price thresholds.

In light of Section 304's incorporation of Section 303, the Department determined that the royalty suspensions in new leases issued under Section 304 in the five years after November 28, 1995 could "vary" as provided in Section 303 and therefore would be subject to price thresholds. New leases issued in 1996, 1997, and 2000 included such price thresholds. App., *infra*, 25a.[4]

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[3] The minimum volumes specified in Section 304—which were the same as the ones established by Section 302 for new production under pre-existing leases, 43 U.S.C. 1337(a)(3)(C)(ii)—originated with the Department and "were developed out of technical analyses conducted by [the Minerals Management Service (MMS)] of the royalty suspension volumes needed for capital cost recovery in developing unproduced oil and gas fields at various water depths in the Gulf of Mexico." Minerals Management Service, Department of the Interior, *Deepwater Royalty Relief for New Leases*, 61 Fed. Reg. 12,023 (1996); see 141 Cong. Rec. 13,002 (1995).

[4] The Department did not include price thresholds in leases that were issued in 1998 and 1999, even though they too were governed by Section 304. When that omission came to light, it triggered congressional concerns and an investigation by the Department's Inspector General. See Office of the Inspector Gen., U.S. Dep't of the Interior, *Investigative Report On the Lack of Price Thresholds in Gulf of Mexico Oil and Gas Leases* 5 (2007) <http://www.doioig.gov/upload/MMS%20ROI%20REDACTED.pdf>. The Inspector General's final report concluded that the omission had been inadvertent and inconsistent with the "policy decision" that the Department made "shortly after the inception of the Outer Continental Shelf Deep Water Royalty Relief Act in 1995 * * * to include price thresholds in the leases issued between 1995 and 2000." *Id.* at 2; see *ibid.* ("MMS field personnel initially attached ad-

2. This case involves eight leases issued in 1996, 1997, or 2000 pursuant to Section 304 of the Royalty Relief Act, under which respondent is a lessee or operator. App., *infra*, 24a, 36a-37a. The notices for each of the three sales at which the leases were purchased—which were published in the *Federal Register*—provided that the leases would include royalty suspensions up to the statutorily designated volumes, but that the suspensions would also be subject to price thresholds and would thus vary based on the price of production from the lease. See 65 Fed. Reg. 45,103 (2000); Admin. R. 189, 233-234; 62 Fed. Reg. 39,865-39,866 (1997); 61 Fed. Reg. 42,715 (1996). Consistent with those notices, each of the eight leases that respondent bid for, signed, and accepted contains a royalty-suspension provision subject to price thresholds. App., *infra*, 2a-3a, 13a, 26a-27a. The price thresholds are set at the amounts specified in 43 U.S.C. 1337(a)(3)(C)(v)-(vii) (governing new production in specified parts of the Gulf of Mexico under existing leases), with terms allowing adjustment for inflation. App., *infra*, 25a-28a. The leases require respondent to make royalty payments for any year in which the average price of oil or gas rises above the specified threshold. *Ibid.*

At various dates between 2002 and 2004, respondent began to produce oil and gas under each of the eight leases. App., *infra*, 30a. The price of gas exceeded the thresholds specified in the leases in both 2003 and 2004, and the price of oil exceeded the specified threshold in 2004. *Id.* at 4a, 31a-32a. Therefore, in a January 6,

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denda to the leases containing price threshold language but stopped for 2 years and instead cited a regulation that they thought contained threshold language, when, in fact, it did not. MMS's review process * * * simply failed to identify this discrepancy.").

2006 decision, the Department ordered respondent to pay royalties on the value of the oil and gas produced under the leases in those years. *Id.* at 4a, 23a-40a.

3. Respondent refused to pay the royalties as ordered and instead brought this action, claiming that the price-threshold provisions it accepted in its leases were contrary to Sections 304 of the Royalty Relief Act. App., *infra*, 2a, 18a-19a. On cross-motions for summary judgment, the district court granted judgment for respondent. *Id.* at 2a, 12a.

The district court relied primarily on the Fifth Circuit's earlier decision in *Santa Fe Snyder Corp.* v. *Norton*, 385 F.3d 884 (2004), which had invalidated part of the Department's regulations implementing Section 304.[5] The district court concluded that Congress did not provide the Secretary with the authority to impose price thresholds on leases issued for deepwater tracts in the Gulf of Mexico during the five years following enactment of the Royalty Relief Act. App., *infra*, 19a-21a. The district court concluded that Congress had specified a volume up to which royalties were to be suspended in Section 304 of the Royalty Relief Act, and that its doing

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[5] The Department had issued regulations that interpreted the suspension of royalties under Section 304 as applying only to leases issued in fields that had not produced oil or gas before the enactment of the Royalty Relief Act. See *Santa Fe Snyder*, 385 F.3d at 889. The Department's regulations also provided that the royalty-suspension volumes would be measured against the combined production from all leases in a field (rather than the production under each individual lease). *Ibid.* In *Santa Fe Snyder*, the Fifth Circuit held that those two aspects of the Department's regulations were contrary to the statute. According to the court, Sections 303 and 304, unlike Section 302, did not contain any "New Production Requirement," and Section 304 made the royalty-suspension volumes applicable on a lease-by-lease, rather than field-by-field, basis. *Id.* at 892-893.

so had removed the Secretary's authority under Section 303 to "vary" those suspensions on the basis of a price threshold. *Ibid.*

4. The court of appeals affirmed. App., *infra*, 1a-11a. Like the district court, the court of appeals relied heavily on its earlier decision in *Santa Fe Snyder*, in which it had considered the interplay between Sections 303 and 304 of the Royalty Relief Act. *Id.* at 8a-11a. The court of appeals began its analysis by noting that this case "is the logical and inevitable extension of *Santa Fe Snyder*" because, in the court's view, the Department sought to use a limitation on royalty relief present in Section 302 (which mandates price thresholds for new production under existing leases) to curtail the royalty relief provided in Section 304 for new leases, just as it had attempted to apply Section 302's "New Production Requirement" to Section 304 in *Santa Fe Snyder*. *Id.* at 9a. The court held that Section 304 "immediately excepts and replaces [the Secretary's] discretion [under Section 303 to vary the suspension on the basis of price thresholds] with a fixed royalty suspension." *Id.* at 10a (quoting *Santa Fe Snyder*, 385 F.3d at 892). The court thus concluded that Section 304's "statement that 'the suspension of royalties shall be set at a volume not less than' the specific production levels means just that: royalty payments shall be suspended up to the production volumes established by Congress"—without any further conditions or exceptions. *Ibid.* Because it found that "Section 304 is unambiguous in this regard," the court did not address whether the Department's contrary con-

struction of the statute is reasonable under "*Chevron*'s second step." *Ibid.*[6]

REASONS FOR GRANTING THE PETITION

The court of appeals' decision will likely cost the United States at least $19 billion in forgone or refunded royalties under several dozen leases that were issued under Section 304 of the Royalty Relief Act, and there is no meaningful likelihood that another court of appeals will have a chance to interpret the same federal statutory provisions. Notwithstanding the obvious importance of the case to the government, the court of appeals based its decision on a cursory examination of the statute, without even addressing the government's arguments about the statutory text and context. As Sections 302 and 303 of the Royalty Relief Act establish, the suspension of royalty payments for oil and gas at production below certain designated volumes can easily co-exist with a requirement that the lessee pay royalties on any oil or gas produced at times when prices exceed certain thresholds. The court of appeals erroneously read out of the statute Section 304's requirement to use the Section 303 bidding system—which includes the express authority to "vary" the suspension of royalties on the basis of such price thresholds (43 U.S.C. 1337(a)(1)(H)). The court's decision is contrary to the statutory language, and, at the very least, fails to give appropriate deference to the Department's reasonable interpretation. This Court should grant the petition for a writ of certiorari to consider an important question about the proper interpretation of a federal statute on which so many billions of dollars of federal revenue turn.

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[6] The court of appeals denied the government's petition for rehearing en banc. App., *infra*, 41a-42a.

A. The Court Of Appeals Incorrectly Interpreted The Royalty Relief Act And Failed To Give Appropriate Deference To The Department's Reasonable Interpretation

The court of appeals concluded (App., *infra*, 10a) that Congress's establishment of minimum production volumes for royalty suspensions in Section 304 of the Royalty Relief Act is unambiguously inconsistent with any residual discretion on the part of the Secretary to vary those royalty suspensions on the basis of price thresholds. But that understanding of the statute is flatly wrong. The Department's contrary interpretation is the best reading of the statute or, at the very least, a reasonable reading entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984).

1. Because this case raises questions "implicating an agency's construction of the statute which it administers," principles of *Chevron* deference control.[7] *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424 (1999) (internal quotation marks omitted). If Congress has "directly spoken to the precise question at issue," "that is the end of the matter," but if the statute is "silent or ambiguous with respect to the specific issue," the agency's interpretation must be upheld so long as it is "a permissible construction of the statute." *Chevron*, 467 U.S. at 842-843.

In interpreting the Royalty Relief Act, the Department understood that the proper construction of Section 304 necessarily depends on the other provision to which it refers, Section 303 (43 U.S.C. 1337(a)(1)(H)). In regulations adopted approximately two months after the

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[7] Congress directed the Department to promulgate rules and regulations necessary to implement both OCSLA in general and the Royalty Relief Act in particular. See 43 U.S.C. 1334(a); RRA § 305, 109 Stat. 566.

RRA was enacted, the Department implemented Section 303 by acknowledging its discretionary authority to include price thresholds in any notices of lease sales. See 30 C.F.R. 260.110(a)(7) (1996); 61 Fed. Reg. 3804 (1996). It explained that the new bidding system would also apply to deepwater leases issued from 1996 to 2000 pursuant to Section 304. See *id.* at 3801. When administering the leasing program under Sections 303 and 304, the Department exercised its authority to specify price thresholds in notices of lease sales (including all of the notices concerning respondent's leases). See p. 7, *supra*. That construction was fully consistent with the best reading of Sections 303 and 304, and is certainly entitled to deference.

2. As outlined above (see pp. 4-5, *supra*), Section 303, which added a new bidding system to OCSLA, contains two relevant clauses. The first authorizes the Secretary to suspend the payment of royalties "for a period, volume, or value of production determined by the Secretary"; and the second states that those "suspensions may vary based on the price of production from the lease." 43 U.S.C. 1337(a)(1)(H). Section 304 then provides that, with regard to the leases issued from November 28, 1995 to November 28, 2000, the Secretary "shall use the bidding system authorized [by Section 303], except that the suspension of royalties shall be set at a volume of not less than" specified amounts. RRA § 304, 109 Stat. 565-566 (43 U.S.C. 1337 note entitled "Lease Sales").

Section 304's "except" clause limits the Secretary's discretion under the *first* clause of Section 303—by requiring the initial suspension to be set on the basis of a volume specified in Section 304 itself, rather than on the basis of a "period, volume, or value of production deter-

mined by the Secretary," as in Section 303, 43 U.S.C. 1337(a)(1)(H). But the "except" clause does not apply to the Secretary's discretion under the *second* clause of Section 303 to "vary" a suspension based on the price of production. That discretion carries over into Section 304 by virtue of the direction in that section that the Secretary "shall use the bidding system" authorized by Section 303. Thus, when Sections 303 and 304 are read together, as they must be, they allow the price thresholds included in respondent's leases. In other words, although Congress in Section 304 "set" minimum royalty suspension volumes, it otherwise incorporated Section 303, including its grant of authority to "vary" during lease administration the suspension volumes set by Congress. That conclusion is reinforced by the established principle that statutory exceptions are to be construed narrowly. *Commissioner* v. *Clark*, 489 U.S. 726, 739 (1989). Here, Congress "excepted" from the system described in Section 303 only the specification of volumes at which royalty suspensions were to be set in the first instance. Congress incorporated unchanged all the rest of that bidding system, including its authorization of variances based on the price of production.[8]

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[8] The relationship between Section 304 and the different portions of Section 303 is evident when Section 304's cross-reference is replaced by the language of Section 303 and Section 304's "except" clause then substituted for Section 303's parallel "suspension of royalties" provision. When thus integrated, as Congress directed, the provisions read as follows (with the language from Section 304 in brackets):

> [For all tracts located in water depths of 200 meters or greater in the Western and Central Planning Area of the Gulf of Mexico, including that portion of the Eastern Planning Area of the Gulf of Mexico encompassing whole lease blocks lying west of 87 degrees, 30 minutes West longitude, any lease sale within five years of the

3. The court of appeals rejected that straightforward interpretation of Section 304 on the ground that allowing royalty suspensions to "vary" based on the prices of oil and gas would "render [Section] 304's mandatory language meaningless" by effectively reducing the production volumes for which royalties are to be suspended. App., *infra*, 9a. But the court's objection is misplaced, and its resulting construction of Section 304 is refuted not only by the text, but also by the context and purpose of the Royalty Relief Act. See, *e.g.*, *Dolan* v. *USPS*, 546 U.S. 481, 486 (2006) (explaining that the "[i]nterpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute").

a. In Sections 302 and 303—the provisions of the Royalty Relief Act dealing with new production under pre-existing deepwater leases in specified parts of the Gulf of Mexico (43 U.S.C. 1337(a)(3)(C)) and with new OCSLA leases generally (including the specified parts of the Gulf of Mexico for leases issued after November

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date of enactment of this title, shall use the] cash bonus bid with royalty at no less than 12 and ½ per centum fixed by the Secretary in amount or value of production saved, removed, or sold, and with suspension of royalties [set at a volume of not less than the following:

(1) 17.5 million barrels of oil equivalent for leases in water depths of 200 to 400 meters;

(2) 52.5 million barrels of oil equivalent for leases in 400 to 800 meters of water; and

(3) 87.5 million barrels of oil equivalent for leases in water depths greater than 800 meters],

which suspensions may vary based on the price of production from the lease.

That combined form gives effect to both the cross-reference to Section 303 and the "except" clause in Section 304.

28, 2000) (43 U.S.C. 1337(a)(1)(H))—Congress mandated or permitted the application of price thresholds even when the minimum production volumes associated with royalty relief have not been reached. See pp. 3-4, *supra*.

Indeed, in Section 302, Congress included mandatory suspension volumes that first appear to be unqualified, but that actually operate to set an initial suspension volume subject to variance depending on the price of oil and gas at the time of production. Section 302 provides that "*in no case* will [the suspension volumes] be less than [the same minimum volumes specified in Section 304]." 43 U.S.C. 1337(a)(3)(C)(ii) (emphasis added). But that seemingly absolute language cannot be read in isolation. Section 302 goes on to provide that—even "[d]uring the production" of the volumes up to which royalties would otherwise be suspended—the amounts of oil and gas that are produced are nevertheless "subject to royalties at the lease stipulated royalty rate" during years in which the average price of oil or gas rises above specified levels. 43 U.S.C. 1337(a)(3)(C)(v) and (vi). In addition, Section 302 expressly provides that "[a]ny production subject to" the price thresholds "shall be counted toward the production volume" for the royalty suspension, even though royalties must be paid on those production amounts. *Ibid.* Thus, the apparently mandatory royalty relief under Section 302 is compromised twice over. First, the relief does not apply to any amounts produced during periods when price thresholds are exceeded. Second, by counting against the production volume associated with the initial royalty suspension, the amounts produced at those times also reduce the amount of production that is subject to relief from royalties in future years. In other words, the royalty suspension *varies* as a result of the application of price thresholds.

By including in an overall scheme to determine royalty relief both mandatory suspension volumes and specified price thresholds, which can be applied in tandem to a single lease, Section 302 demonstrates that the two concepts are not mutually exclusive. To the contrary, as Section 303 also confirms, price thresholds—provisions that allow a suspension of royalties to "vary" according to the price of production—are fully compatible with the statute's specification of a volume at which a royalty suspension is initially set. They are also consistent with the very function of "variances," which provide for an exception from a general rule in circumstances in which the purposes of the rule do not apply. See, *e.g.*, *EPA* v. *National Crushed Stone Ass'n*, 449 U.S. 64, 76-77 (1980); see also pp. 17-18, *infra* (discussing the purposes of the RRA).

Section 304 is no different from Sections 302 and 303 in this regard. In Section 304, Congress required suspension of royalties at certain volumes and also required the Secretary to use the Section 303 bidding system—which includes the authorization to vary the congressionally set suspensions based on the price of oil and gas. That dual requirement is consistent with Congress's decision throughout the Royalty Relief Act to combine a system for *suspending* royalties with a system for *varying* those suspensions based on the price of oil and gas at the time of production. Such price thresholds serve to ameliorate the distortions that would occur at a time of high energy prices if royalty suspensions were based on volume of production alone.

Thus, given Sections 302 and 303, which expressly contemplate the applicability of *both* minimum volumes for royalty suspensions *and* price thresholds, the court of appeals erred in concluding (App., *infra*, 9a) that the

application of price thresholds under Section 304 would render suspension volumes "meaningless." As a result, the court misunderstood the import of Section 304's language mandating minimum volumes for royalty suspensions, interpreting it to carry a negative implication that other, linked sections of the statute expressly refute. In sum, the court failed to appreciate that the Royalty Relief Act as a whole, including Section 304, permits the Secretary to include price thresholds in leases that also include minimum suspension volumes.

b. The Department's interpretation is also consistent with the purposes of the Royalty Relief Act. No one disputes that for leases issued before November 28, 1995 and after November 28, 2000, Congress acted both to spur production and to protect the public fisc by offering suspended royalties but conditioning the suspensions on price thresholds. Thus, the Secretary is required to impose price thresholds for new production on existing leases that qualified for royalty relief. 43 U.S.C. 1337(a)(3)(C)(v) and (vi). And the Secretary is permitted to impose such price thresholds for new leases issued in the same geographic areas after Section 304's five-year period. 43 U.S.C. 1337(a)(1)(H).

It would, to say the least, be anomalous for Congress to have mandated price thresholds for existing leases, and to have authorized price thresholds for new leases in the future, and yet to have prohibited price thresholds, in the selfsame piece of legislation, during the five-year interim period addressed by Section 304. The purpose of the Royalty Relief Act was to create economic incentives for new production. Price thresholds are fully consistent with that goal, because the economic incentive of a royalty suspension is no longer necessary when the price of oil or gas rises sufficiently high. Indeed,

respondent bid on and entered into the very leases at issue here knowing that they contained such price thresholds. And at the point at which special economic incentives are no longer necessary, the purpose of protecting the public fisc through the collection of the standard royalties in the lease becomes paramount. See 43 U.S.C. 1344(a)(4) (OCSLA requires leasing activities "to assure receipt of fair market value for the lands leased and the rights conveyed by the Federal Government").

There is nothing in the text, structure, or purpose of the Royalty Relief Act to suggest that Congress intended for price thresholds to apply in every circumstance except for leases issued during the five-year period following enactment of the statute—and thereby to forgo billions of dollars in revenue otherwise due to the American public, and to bestow billions of dollars of windfalls on lessees when oil and gas prices are high.

B. There Will Be No Meaningful Opportunity For Further Interpretation Of The Royalty Relief Act In The Courts Of Appeals

Although there is no conflict in the circuits about the correct interpretation of Section 304 of the Royalty Relief Act, the unusual circumstances of the statute and its application all but guarantee that the Department's arguments will not be considered by other courts of appeals. By its terms, Section 304 applies only to leases issued for deepwater tracts on the outer Continental Shelf in certain portions of the Gulf of Mexico "lying west of 87 degrees, 30 minutes West longitude." 109 Stat. 565. Those areas are generally adjacent to Texas, Louisiana, and Mississippi, and the Department did not issue any leases under Section 304 for tracts that are within the territorial jurisdiction of any court of appeals

other than the Fifth Circuit. Additional litigation with other lessees about the payment of future royalties would be brought in the same way this case was: A lessee could challenge an order to pay royalties as contrary to law under the Administrative Procedure Act, 5 U.S.C. 706(2). As respondent did, other lessees could be expected to bring any future suits in the Fifth Circuit, given its holding that price thresholds are unambiguously beyond the agency's authority under Section 304 when minimum suspension volumes have not been reached.[9]

Although there is one plausible route to another court of appeals, it would be very unlikely to result in a circuit split reviewable by this Court and thus does not justify the denial of further review at this time. The Fifth Circuit's decision in *Santa Fe Snyder* noted that a lessee seeking a refund of royalties that had already been paid to the government should file suit in the Court of Federal Claims (for a claim involving more than $10,000), see 385 F.3d at 893, and such a suit could be appealed to the Federal Circuit, see 28 U.S.C. 1295(a)(3). As an initial matter, that scenario would require the Department to refuse to accept the Fifth Circuit's decision regarding payments already made under a lease within that court's jurisdiction, even as the Department would be effectively prevented from demanding any *additional* payments from the same lessee under the same lease term. Cf. *National Cable & Tele-*

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[9] In this case, respondent alleged venue (Compl. ¶ 10) under 28 U.S.C. 1392(e)(1) (which refers to the residence of the defendant) and 43 U.S.C. 1349(b)(1) (which allows a proceeding with regard to a case arising out of the production of minerals on the outer Continental Shelf to be "instituted in the judicial district in which any defendant resides or may be found, or in the judicial district of the State nearest the place the cause of action arose").

comms. Ass'n v. *Brand X Internet Servs.*, 545 U.S. 967, 984-985 (2005) (explaining that an appellate opinion that finds a statute "unambiguous" overrides an agency's contrary interpretation of the statute). And, in fact, if the Fifth Circuit's decision is allowed to stand, the Department does not intend under the circumstances to oppose refunds of royalties that were, under that court's reasoning, beyond its statutory authority to collect.[10] Moreover, even if such a suit were brought and appealed to the Federal Circuit, and if the government then prevailed, the Federal Circuit's decision would apply only to royalties that had already been collected, and the lessee could decide not to seek this Court's review, because the loss of royalties already paid could be more palatable than the possibility of having to pay royalties on all future production. If, on the other hand, the government were to lose in the Federal Circuit, there would still be no circuit split.

This Court should not rely on the speculative possibility of another appellate ruling under such circumstances. If the Court were to deny certiorari here, the Fifth Circuit's decision would likely be the final word interpreting Section 304 of the Royalty Relief Act. This case is therefore akin to those arising within the exclusive jurisdiction of the Federal Circuit, in which there is no realistic opportunity for another court of appeals to

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[10] In March 2008, after the district court's decision in this case, the Department advised parties making royalty payments not to adjust their prior or ongoing royalty payments until there is a final, non-appealable judgment. It also suggested that requests for refunds of royalties be made in the interim only when they might otherwise be barred by a statute of limitations. The Department would be particularly reluctant to refuse to refund royalties it collected on the basis of that letter.

address the questions raised. In such circumstances, the lack of a circuit split does not suffice to insulate the court of appeals' decision from this Court's certiorari jurisdiction. See Eugene Gressman et al., *Supreme Court Practice* 286-288 (9th ed. 2007).

C. If Allowed To Stand, The Court Of Appeals' Decision Will Cost The United States Treasury Billions Of Dollars In Lost Revenue

The court of appeals' decision presents an important question of federal statutory interpretation in part because, if allowed to stand, it will require the government to forgo many billions of dollars of revenue.

As Justice Scalia recently explained in a case in which a private party faced "a possible $1.4 billion judgment" and also had potentially $40 billion at stake in other pending class actions, "enormous potential liability, which turns on a question of federal statutory interpretation, is a strong factor in deciding whether to grant certiorari." *Fidelity Fed. Bank & Trust* v. *Kehoe*, 547 U.S. 1051, 1051 (2006) (Scalia, J., joined by Alito, J., concurring in the denial of certiorari); accord Gressman 269 ("The fact that especially large amounts of money are involved in litigation over the issue of statutory construction may also be a persuasive factor, though not always sufficient by itself unless the amount is enormous.").

In this case, the Department's 2006 order required respondent to pay approximately $36.2 million in royalties for production of oil and gas from eight leases in 2003 and 2004. Moreover, the Department estimates that another $159 million in royalties came due on production in 2005-2007 under the terms of those eight leases alone. But this is the least of the matter. Respondent

and its corporate affiliates have interests in ten other leases on which the Department estimates an additional $169.3 million in royalties came due on production through 2007. The court of appeals' decision will also govern the disposition of billions of additional dollars of potential federal revenue involving other lessees. There are 21 other pending administrative appeals of similar orders to pay royalties under Section 304 leases—appeals that have generally been held in abeyance pending resolution of this case. And some similarly situated lessees have continued to pay royalties during this litigation; as of June 30, 2009, the Department had collected an estimated $1.5 billion in royalties from leases issued in 1996, 1997, and 2000, the validity of which is called into doubt by the court of appeals' decision.

In addition to the royalties already due or paid, vastly more is at stake. The court of appeals' decision, if allowed to stand, will prevent the government from collecting royalties on oil and gas production in any future year in which the price thresholds are exceeded. As the Department recently informed Congress, its most recent predictions are that 83 leases from 1996, 1997, and 2000 will produce 2.46 to 2.7 billion barrels of oil equivalent before reaching the royalty-suspension volumes required by the court of appeals' decision. Letter from Richard T. Cardinale, Chief of Staff, Land & Minerals Mgmt., U.S. Dep't of the Interior, to Hon. Dianne Feinstein, Chairman, Subcomm. on Interior, Env't & Related Agencies, Senate Appropriations Comm., encl. 5b (Mar. 9, 2009). That would result in forgone future royalties estimated at $17.97 to $18.98 billion. *Ibid.* (The amount could, of course, be higher if either the amounts produced or the prices of oil and gas turn out to

be higher than the estimates that the Department used in making its forecast.[11])

Whatever the precise amount of forgone future royalties ultimately proves to be, the total cost will be huge, and it will have a direct, adverse affect on the Treasury of the United States. See 43 U.S.C. 1337(m) and 1338 (requiring royalties to be "deposited in the Treasury of the United States and credited to miscellaneous receipts"). And, correspondingly, those same sums will constitute huge and unjustified windfalls for respondent and other lessees that bid for, signed, and extracted federal oil and gas under leases that expressly provide for the very price thresholds they now seek to avoid. The "enormous" sum of federal revenue that turns on the "question of federal statutory interpretation" presented by this case is thus "a strong factor" counseling in favor of certiorari. *Fidelity Fed. Bank & Trust*, 547 U.S. at 1051 (Scalia, J., concurring in the denial of certiorari).[12]

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[11] In 2008, the Government Accountability Office conducted its own study of the 1996, 1997, and 2000 leases, and estimated that a loss in this case by the government would cost between $15.1 and $38.3 billion in forgone royalties from oil and gas production under 84 leases over the next 25 years. U.S. Gov't Accountability Office, *GAO-08-792R, Oil and Gas Royalties: Litigation Over Royalty Relief Could Cost the Federal Government Billions of Dollars* 8 (June 5, 2008) <http://www.gao.gov/new.items/d08792r.pdf>.

[12] This case is not in an interlocutory posture and thus does not present the circumstance that caused Justices Scalia and Alito to concur in the denial of certiorari in *Fidelity Federal Bank & Trust*. See 547 U.S. at 1051.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 2009

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-30069

KERR-MCGEE OIL AND GAS CORP.,
PLAINTIFF-APPELLEE

v.

UNITED STATES DEPARTMENT OF INTERIOR;
C. STEPHEN ALLRED, ASSISTANT SECRETARY, ON
BEHALF OF LAND & MINERALS MANAGEMENT, ON
BEHALF OF UNITED STATES DEPARTMENT OF
INTERIOR, DEFENDANTS-APPELLANTS

Jan. 12, 2009

Before: KING, DENNIS and ELROD, Circuit Judges.

KING, Circuit Judge:

The Outer Continental Shelf Deep Water Royalty Relief Act authorizes the Department of the Interior to suspend the collection of oil and gas royalties from all new and preexisting federal, deepwater leases and to impose price or volume thresholds in order to determine when royalty payments should recommence. Additionally, for new deepwater leases issued between 1996 and 2000 for specific areas in the Gulf of Mexico, the act explicitly waives all royalty payments until a specific volume of oil or gas is produced. Kerr-McGee Oil and Gas

Corp. obtained eight new deepwater leases that, in addition to waivers based on volume, contained price thresholds set by the Department of the Interior. When oil and gas prices moved above those price thresholds, the Department of the Interior sought to collect royalties on these leases, despite the fact that the congressionally set volume thresholds had not yet been met. Kerr-McGee challenged the Department of Interior's order to pay royalties in the district court, which concluded on summary judgment that the agency did not have the authority to impose price thresholds requiring the payment of royalties on volumes less than the volume thresholds set by Congress. We agree and affirm the district court's decision for the following reasons.

I. FACTUAL AND PROCEDURAL BACKGROUND

The facts of this case are undisputed. Between 1996 and 2000, Kerr-McGee Oil and Gas Corp. ("Kerr-McGee") obtained eight deepwater, Gulf of Mexico mineral leases subject to royalty relief. These leases stipulated, however, that royalties would commence when certain price thresholds were met. Six of these leases employ the following language to impose such price thresholds:

> In any year during which the arithmetic average of the closing prices on the New York Mercantile Exchange for light sweet crude oil exceeds $28.00 per barrel, royalties on the production of oil must be paid . . . and production during such years counts toward the royalty suspension volume. In any year during which the arithmetic average of the closing prices on the New York Mercantile Exchange for natural gas exceeds $3.50 per million British thermal

> units, royalties on the production of natural gas must be paid . . . and production during such years counts toward the royalty suspension volume.

The remaining two leases contain substantially similar language:

> In any year during which the arithmetic average of the closing prices on the New York Mercantile Exchange (NYMEX) for light sweet crude oil exceeds $28.00 per barrel (threshold oil price), royalties on the production of oil must be paid . . . and production during such years counts toward the royalty suspension volume.
>
> In any year during which the arithmetic average of the closing prices on the NYMEX for natural gas exceed $3.50 per million British thermal units (threshold gas price), royalties on the production of natural gas must be paid . . . and production during such years counts toward the royalty suspension volume.[1]

All eight leases are additionally subject to the volume thresholds established by § 304 of the Outer Continental Shelf Deep Water Royalty Relief Act (the "DWRRA"), which states:

> For all tracts located in water depths of 200 meters or greater in the Western and Central Planning Area of the Gulf of Mexico, including that portion of the Eastern Planning Area of the Gulf of Mexico encompassing whole lease blocks lying west of 87 degrees, 30 minutes West longitude, any lease sale within five years of the date of enactment of this title, shall use the bidding system authorized in section 8(a)(1)(H)

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[1] Both leases adjust the triggering prices for inflation.

of the Outer Continental Shelf Lands Act, as amended by this title, except that the suspension of royalties shall be set at a volume of not less than the following:

(1) 17.5 million barrels of oil equivalent for leases in water depths of 200 to 400 meters;

(2) 52.5 million barrels of oil equivalent for leases in 400 to 800 meters of water; and

(3) 87.5 million barrels of oil equivalent for leases in water depths greater than 800 meters.

Pub. L. No. 104-58, 109 Stat. 557 (uncodified, but present in a note to 43 U.S.C. § 1337).

In 2003, the average annual price of natural gas exceeded the leases' inflation-adjusted price threshold. In 2004, the average annual prices of both oil and gas exceeded the respective price thresholds for those commodities. Not one of the leases, however, had enjoyed production that triggered the volume thresholds imposed by § 304.

Based on the triggered price thresholds, the United States Department of the Interior ("Interior") issued a final agency order (the "Burton Decision"). The Burton Decision informed Kerr-McGee that the oil and gas price thresholds had been exceeded, concluded that Interior had authority to suspend royalty relief based on price thresholds triggered before production exceeded § 304's volume thresholds, and directed Kerr-McGee to pay royalties.

Kerr-McGee challenged the Burton Decision in federal district court, and, on summary judgment, the court ruled that Interior did not have the authority to suspend

royalty relief for production at volumes less than those established by Congress. Interior brought this timely appeal, arguing that the DWRRA does not alter the agency's discretionary authority to vary royalty relief by imposing price thresholds that suspend royalty relief before § 304's volume thresholds are exceeded.

II. STANDARD OF REVIEW

We review de novo a grant of summary judgment, applying the same legal standards that the direct court applied. *Kornman & Assocs., Inc. v. United States*, 527 F.3d 443, 450 (5th Cir. 2008). Summary judgment is proper when the evidence reflects "no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c).

An agency's interpretation of its statutory authority is reviewed according to the two-step inquiry established in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). *Med. Ctr. Pharmacy v. Mukasey*, 536 F.3d 383, 393 (5th Cir. 2008). First, we "must give effect to the unambiguously expressed intent of Congress" if Congress has, indeed, "directly spoken to the precise question at issue." *Id.* (internal quotation marks omitted). If we determine that the statute is ambiguous, then we proceed to *Chevron*'s second step and "'reverse [an] agency's decision only if it [is] arbitrary, capricious, or manifestly contrary to the statute.'" *Id.* (quoting *Tex. Coal. of Cities for Util. Issues v. FCC*, 324 F.3d 802, 807 (5th Cir. 2003)) (alterations in original).

III. DISCUSSION

Under *Chevron's* first step, we must consider whether Congress unambiguously granted Interior the authority to suspend royalty relief at production volumes less than those established by § 304. To interpret the statute, we begin by looking at its plain text. *Wheeler v. Pilgrim's Pride Corp.*, 536 F.3d 455, 458 (5th Cir. 2008). The DWRRA contains three operative sections, and, because "it is a cardinal rule that a statute is to be read as a whole," *In re Supreme Beef Processors, Inc.*, 468 F.3d 248, 253 (5th Cir. 2006) (en banc), we describe each section in turn. The first section applies only to leases in existence prior to the act's effective date and states:

> (i) [N]o royalty payments shall be due on new production . . . from any lease or unit located in water depths of 200 meters or greater in the [same geographic region of the Gulf of Mexico specified in § 304] until such volume of production as determined pursuant to clause (ii) has been produced by the lessee.
>
> (ii) Upon submission of a complete application by the lessee, the Secretary [of Interior] shall determine . . . whether new production from such lease or unit would be economic in the absence of the relief from [royalties]. . . . If the Secretary determines that such new production would be economic in the absence of the relief from [royalties] . . . the Secretary must determine the volume of production from the lease or unit . . . in order to make such new production economically viable; except that for new production . . . in no case will that volume be less than 17.5 million barrels of oil equivalent in water

depths of 200 to 400 meters, 52.5 million barrels of oil equivalent in 400-800 meters of water, and 87.5 million barrels of oil equivalent in water depths greater than 800 meters. . . .

* * *

(v) During the production of volumes determined pursuant to clause[ ] (ii) . . . in any year during which the arithmetic average of the closing prices on the New York Mercantile Exchange for light sweet crude oil exceeds $28.00 per barrel, any production of oil will be subject to royalties. . . .

(vi) During the production of volumes determined pursuant to clause[ ] (ii) . . . in any year during which the arithmetic average of the closing prices on the New York Mercantile Exchange for natural gas exceeds $3.50 per million British thermal units, any production of natural gas will be subject to royalties. . . .

DWRRA § 302, 43 U.S.C. § 1337(a)(3)(C). The DWRRA's next section authorizes a new bidding method that Interior may use in leasing any of the submerged lands of the Outer Continental Shelf. It provides that bidding may be on the basis of a:

cash bonus bid with royalty at no less than 12 and 1/2 per centum fixed by the Secretary in amount or value of production saved, removed, or sold, and with suspension of royalties for a period, volume, or value of production determined by the Secretary, which suspensions may vary based on the price of production from the lease. . . .

Id. § 303, 43 U.S.C. § 1337(a)(1)(H). The DWRRA's final section, set forth in full above, specifically addresses new, deepwater leases sold in a specific region of the Gulf of Mexico between 1996 and 2000. The pertinent language of that section states that "the suspension of royalties shall be set at a volume of not less than the following" specifically established volume thresholds. *Id.* § 304, Pub. L. No. 104-58, 109 Stat. 557 (uncodified, but present in a note to 43 U.S.C. § 1337).

Looking to *Santa Fe Snyder Corp. v. Norton*, 385 F.3d 884 (5th Cir. 2004), the district court concluded that Interior did not have the authority to suspend royalty relief for new leases at production volumes less than those set by Congress in § 304. In *Santa Fe Snyder*, we considered whether Congress granted Interior the authority to limit the application of § 304's royalty relief to only those new leases that resulted in new production from a field. *Id.* at 889-90.[2] Under *Chevron*'s first step, we stated that the question was "whether Section 304 of the [DW]RRA unambiguously provides that royalty suspensions apply in full to each [n]ew [l]ease qualifying under its terms," which we answered affirmatively. *Id.* at 890, 892. In doing so, we juxtaposed the economic justification required for existing leases to obtain royalty relief under § 302—the new production requirement—with the limited, objective requirements to obtain royalty relief for new leases under § 304—water-depth and

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[2] A "field" is "an area consisting of a single reservoir or multiple reservoirs all grouped on, or related to, the same general geological structural feature and/or stratigraphic trapping condition." *Id.* at 889 (internal quotation marks omitted). The new production prerequisite required a lessee to show that no oil or gas had yet been produced from anywhere in the field before obtaining royalty relief. *See id.* at 889-90.

location. *See id.* at 892-93 ("Congress clearly imposed a New Production Requirement on [e]xisting [l]eases. It did not do so for [n]ew [l]eases.").

The current case is the logical and inevitable extension of *Santa Fe Snyder*, as the district court correctly reasoned. Here, as in that case, Interior seeks to employ a royalty-relief limitation present in § 302 (which applies to leases existing prior to the DWRRA's enactment) in order to limit the royalty relief granted to new leases by § 304. Interior asserts that § 304's reference to § 303's bidding process nonetheless grants Interior the discretion to "vary" the suspension of § 304's royalty relief based on the prices of oil and gas.[3] But the plain language of the statute does not bear Interior's interpretation. Section 304 states that "the suspension of royalties shall be set a volume not less than" the stated production volumes. Interior's reading would render § 304's mandatory language meaningless: if price thresholds trigger royalty payments before § 304's production volumes are exceeded, then the royalty payment suspension *is* being set at a volume less than § 304's specified production levels. While § 303 grants Interior discretion to "vary" royalty relief for all new leases of submerged lands on the Outer Continental Shelf based

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[3] We note that, below, Interior raised the affirmative defense that Kerr-McGee should be estopped from challenging the legality of the price thresholds because the company bid on and signed leases containing these provisions. The district court ruled that this defense was unavailable because government officials cannot enforce by estoppel a contract that they were not legally authorized to make. *See LaBarge Prods., Inc. v. West*, 46 F.3d 1547, 1552 (Fed. Cir. 1995). In its briefs to this court, Interior does not contend that any such affirmative defense applies; therefore, it has abandoned this argument. *See Fuzy v. S & B Eng'rs & Constructors, Ltd.*, 332 F.3d 301, 302 (5th Cir. 2003).

on the price of production, § 304 "immediately excepts and replaces Interior's discretion with a fixed royalty suspension for [n]ew [l]eases on a volume basis" where those new leases are located in the geographic region specified by § 304. *Id.* at 892. Had Congress intended to impose price thresholds on the royalty relief for these new leases, it certainly knew how to do so. *See, e.g.*, DWRRA § 302 (specifically setting price thresholds on royalty relief for existing leases that qualify for royalty relief); *see also* Royalty Relief for American Consumers Act of 2006, H.R. 4749, 109th Cong. § 2(a) (2006) (proposed legislation seeking to suspend all royalty relief if specified price thresholds are met). However, Congress refrained from specifically establishing such price thresholds, and we refuse Interior's invitation to read this royalty-relief limitation into the statute.

Thus, the plain language of § 304 dictates our conclusion in this case just as it did in *Santa Fe Snyder*. The statement that "the suspension of royalties shall be set at a volume not less than" the specific production levels means just that: royalty payments shall be suspended up to the production volumes established by Congress. Section 304 is unambiguous in this regard, and it does not grant Interior the authority to impose price thresholds that suspend royalty relief at production volumes less than those established by Congress in § 304. Therefore, we need not extend our analysis to *Chevron*'s second step.

Finally, Interior makes the same argument that it made in *Santa Fe Snyder* regarding the DWRRA's legislative history. *See* Federal Defendants-Appellants' Opening Brief at 27-29, *Sante Fe Snyder*, 385 F.3d 884 (No. 03-30648); Federal Defendants-Appellants' Reply

Brief at 14-16, *Sante Fe Snyder*, 385 F.3d 884 (No. 03-30648). Kerr-McGee points to competing passages in the legislative history in support of its position. But as we stated in *Santa Fe Snyder*, "[b]ased on our conclusion that the statutory language is unambiguous, we need not follow the Interior's suggestion to look to legislative history as a guide in interpreting the [statute]." 385 F.3d at 893.

IV. CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

No. 2:06 CV 0439

KERR-MCGEE OIL & GAS CORP.

v.

C. STEPHEN ALLRED, ASSISTANT SECRETARY FOR LAND & MINERALS MGT., AND THE DEPT. OF THE INTERIOR

[Filed: Oct. 30, 2007]

MEMORANDUM RULING

PATRICIA MINALDI, United States District Judge.

Before the court is plaintiff Kerr-McGee Oil & Gas Corp.'s ("Kerr-McGee") Motion for Summary Judgment and C. Stephen Allred and the Department of the Interior's ("the Interior") Cross-Motion for Summary Judgment.[1]

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[1] Pl.'s Mot. for Summary Judgment [doc. 28]; Def.'s Cross-Mot. for Summary Judgment [doc. 39].

FACTS

Congress enacted the Outer Continental Shelf Deepwater Royalty Relief Act of 1995 ("DWRRA"), codified at 43 U.S.C. § 1337, to encourage the exploration of oil and gas in the Gulf of Mexico's deepwater, where the risks and costs of operation were high.[2] Kerr-McGee has invested over $3.5 billion to develop deepwater leases in the Gulf.[3] The eight deepwater leases for which Kerr-McGee was ordered to pay royalties contain language that makes mandatory royalty relief[4] subject to specified price thresholds.[5]

On January 6, 2006, Acting Assistant Secretary Burton signed an Order directing Kerr-McGee to pay royalties on natural gas it produced in 2003, and on both oil and natural gas produced in 2004, for eight leases Kerr-McGee operated under the DWRRA.[6] The Burton Decision found that the average annual price of natural gas

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[2] S. Rep. No. 103-248, at 3-4 (1994).

[3] Pl.'s Compl. ¶ 2.

[4] The DWRRA of 1995 eliminates the Secretary's discretion to set the volume of royalty suspension for leases enacted between November 28, 1995 and November 28, 2000. 43 U.S.C. § 1337(a)(3)(C)(i).

[5] Under the terms of the lease between Kerr-McGee and the Interior, Kerr-McGee makes royalty payments to the Interior if the commodity price of oil or case [*sic*] exceeds a prescribed threshold level (a "price threshold"), even when the lease has not yet produced the volume of oil and gas that was to be royalty-free under the DWRRA. United States Department of Interior, Order to Report and Pay Royalties and Interest Due Under Identified Offshore Federal Oil and Gas Leases (Jan. 6, 2006) ("The Burton Decision"), at 2-4. The Burton Decision is so named because it was signed by Acting Assistant Secretary Burton. *Id.* at 11.

[6] *Id.* at 10.

was in excess of the price threshold for 2003 and 2004, and the average annual price of oil was in excess of the price threshold in 2004.[7] The Burton Decision is a final agency action subject to judicial review.[8] On March 17, 2006, Kerr-McGee filed for declaratory judgment and injunctive relief against the Department, challenging the Burton Decision.[9]

BACKGROUND OF THE CONTROLLING STATUTES AND THE BURTON DECISION

This action arises under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.*, the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1331 *et seq.*, and the DWRRA, 43 U.S.C. § 1337.

A.) The OCSLA

The OCSLA gives the Secretary of the Interior the authority to issue and administer oil and gas leases on the outer continental shelf and to promulgate implementing regulations. 43 U.S.C. § 1334(a). The Minerals Management Service ("MMS") administers the OCS leasing program by conducting lease sales. Pursuant to the OCSLA, the typical royalty for offshore deepwater leases is one-sixth. *Id.*

B.) The DWRRA

The DWRRA amended the OCSLA and gave the Secretary the authority to suspend royalties on certain volumes of initial production from the deepest areas of the Gulf. 43 U.S.C. § 1337(a)(3)(C)(i) & (ii). The DWRRA

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[7] *Id.*

[8] *Id.* at 11.

[9] Pl's Compl.

established three specific schemes for royalties from deepwater leases. *Id.* § 1337(a)(3)(C)(v)-(vii).

First, companies with leases existing on November 28, 1995 were not exempt from paying on new production until the volume exceeded the prescribed price threshold level. *Id.* Section 302 permits existing lessees to apply for royalty relief, which the Secretary would award if the lease would otherwise not be economic. *Id.* § 1337(a)(3)(C)(ii). Additionally, Section 302 expressly provides that no royalty relief is allowed if the price of oil or gas meets a price threshold, as statutorily defined by Congress. *Id.* § 1337(a)(3)(C)(v)-(vi). MMS implemented price threshold provisions for these leases. 30 C.F.R. § 203.78.

Second, Congress required the Interior to provide royalty relief to leases enacted between November 28, 1995 and November 28, 2000 ("Mandatory Royalty Relief Leases"). 43 U.S.C. § 1337 (Note); *see also Sante Fe Snyder Corp. v. Norton*, 385 F.3d 884 (5th Cir. 2004). Mandatory Royalty Relief Leases are governed by the bidding system authorized in Subparagraph H of § 1337. *Id.* § 1337(a)(1)(H). In Section 304, however, Congress "immediately excepts and replaces Interior's discretion [under Section 303] with a fixed royalty suspension. . . ." *Santa Fe Snyder*, 385 F.3d at 892 (noting that under Pub. L. 104-58, § 304, royalties are suspended for specific volumes and water depths). Eight of Kerr-McGee's Mandatory Royalty Relief Leases are at issue in this suit.

Third, leases issued after the five-year period ended on November 28, 2000 are governed by Section 303, and the Secretary is authorized to provide royalty relief and to impose price thresholds. 43 U.S.C. § 1337(a)(3)(C).

C.) The Burton Decision

The Burton Decision interpreted Section 304 of the DWRRA as it applied to Kerr-McGee's eight deepwater leases, and found that Kerr-McGee owed the Interior royalties from these leases because price thresholds were satisfied. The Burton Decision at 4. The Burton Decision found that the royalty relief available to the eight Kerr-McGee leases was limited by price thresholds contained in the terms of the leases, imposed pursuant to Congressional authority. *Id.* The Burton Decision rejected Kerr-McGee's argument that Mandatory Relief Leases are not subject to price thresholds below the minimum volume of royalty-free production. *Id.*

The Burton Decision first rejected Kerr-McGee's interpretation of *Santa Fe Snyder*, stating that *Santa Fe Snyder* did not discuss price thresholds and is therefore not a basis for Kerr-McGee to avoid enforcement of the price threshold provisions in its leases. *Id.* Thus, the Burton Decision found that the price threshold provisions promulgated in 1337(a)(1)(H) apply to leases executed between November 28, 1995 and November 28, 2000, and therefore apply to Kerr-McGee's leases, regardless of whether minimum volume of royalty-free production was first produced. The Burton Decision also applied the price thresholds to assess how much money Kerr-McGee owes the Department. *Id.* at 4-8.

STANDARD OF RELIEF

Courts review agency action under the APA by first determining whether the agency decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accorance with law; [or] . . . in excess of statutory jurisdiction, authority, or limitations, or short of

statutory right." 5 U.S.C. § 706(2)(A). When reviewing an agency action, a court first determines:

> [w]hether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines that Congress has not addressed the precise question at issue . . . the question for the court is whether the agency's answer is based upon a permissible construction of the statute.

Chevron U.S.A., Inc. v. Natural Res. Def. Counsel, 467 U.S. 837, 842-43 (1984). "In reaching a determination whether Congress has spoken directly on an issue, courts are free to consider both the plain language and meaning of the statute and any pertinent legislative history." *Ghiglieri v. Sun World Nat'l Ass'n*, 117 F.3d 309, 313 (5th Cir. 1997).

Under *Chevron*'s second prong, if a court finds the statute ambiguous, the court examines whether "the agency's answer is based upon a permissible construction of the statute." *Chevron*, 467 U.S. at 843. An agency is entitled to "substantial deference" when interpreting its own regulations, and, accordingly, the agency interpretation must be followed unless it is plainly wrong or inconsistent with the regulation. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994). "It is elementary administrative law that an agency must operate within the confines of its own regulations." *Am. Petroleum Inst. v. E.P.A.*, 787 F.2d 965, 975 (5th Cir. 1986).

A court should grant a motion for summary judgment when the file demonstrates that "there is no genu-

ine issue of material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). The party moving for summary judgment is initially responsible for demonstrating the reasons justifying the motion for summary judgment by identifying portions of pleadings and discovery that demonstrate the lack of a genuine issue of material fact for trial. *Tubacex, Inc. v. M/V Risan*, 45 F.3d 951, 954 (5th Cir. 1995). The court must deny the moving party's motion for summary judgment if the movant fails to meet this burden. *Id.* If the movant satisfies this burden, however, the nonmoving party must "designate specific facts showing that there is a genuine issue for trial. *Id.*

ANALYSIS

The crux of this case is whether Section 304, which requires mandatory royalty relief for specified volumes, also stripped the Interior of its discretion to set price thresholds that would apply before a Mandatory Relief Lease produced the minimum volume of royalty-free production. Kerr-McGee contends that Mandatory Relief Leases are not subject to price thresholds below the minimum volume of royalty-free production, whereas the Department argues it retained the discretion to set price thresholds below the minimum volume of royalty-free production.

A.) Chevron Review of the Burton Decision

Kerr-McGee contends that the Burton Decision is unlawful under the first step of *Chevron*, because Congress clearly articulated its intent to establish mandatory royalty relief for specified volumes in the DWRRA.

Kerr-McGee argues that the DWRRA's mandatory royalty relief provision, Section 304, also prevents the Interior from enacting price thresholds for volumes below the minimum volume articulated in the DWRRA. Accordingly, Kerr-McGee maintains that the Burton Decision was contrary to law because the defendants conditioned royalty relief in Kerr-McGee's Mandatory Relief Leases upon commodity prices for oil and gas remaining below price thresholds.[10]

The Interior argues that the DWRRA clearly established the authority of the Interior to establish price thresholds on new leases. The Interior argues that Section 304 did not deprive the agency of its ability to establish price thresholds because Section 304 specifies the use of the Section 303 bidding system, which permits price thresholds, and nothing in Section 304 removes the authority for price thresholds. Thus, the Interior argues that price thresholds are permissible. Moreover, the Interior argues that *Santa Fe Synder* should be limited to its holding that leases enacted between 1996-2000 contained mandatory royalty relief for minimum volumes of production. The Interior argues that *Santa Fe Snyder* does not preclude the imposition of price thresholds below the minimum volumes for which royalty relief was to be mandatory.

The Fifth Circuit interpreted Sections 303 and 304 of the DWRRA as they pertain to new production requirements for Mandatory Royalty Relief leases. *Santa Fe Snyder*, 385 F.3d at 883-84. Section 303 added a new bidding system that gave the Interior the authority to lease any water depth in any location with royalty relief

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[10] Pl.'s Compl. 13-14.

fashioned according to the Interior's discretion. 43 U.S.C. § 1337(a)(1)(H). The *Santa Fe Snyder* court found that this power, however, was tempered by the next section, where Congress replaced the Interior's discretion to fashion royalty relief with a fixed royalty suspension scheme based on volume and water depth. 385 F.3d at 892; *see also* 43 U.S.C. § 1337 (Note). Thus, the royalty relief for Mandatory Royalty Relief leases is automatic and unconditional.

The *Santa Fe Snyder* court found that Section 304 clearly articulated Congress's unambiguous intent that a suspension of royalties shall be set at the volume levels provided for in the statute. 385 F.3d at 892-93 (Section 304 dictates that "the suspension of royalties shall be set at a volume of not less than [states differing amounts varying on water depth]"). In interpreting Section 304, the *Santa Fe Snyder* court held that:

> Section 304 mandates that, without exception, based only on the objective factors of water depth, location of the lease block and date of the lease sale, all leases meeting these objective criteria are entitled to receive the suspensions of royalties benefit, which the Secretary may not set at a volume less than the particular volume assigned for each water depth. The statute is unambiguous on this point.

Id. at 891. The *Santa Fe Snyder* court found that the Interior's addition of a new production requirement was contrary to law and thus the Fifth Circuit did not proceed beyond *Chevron*'s first step. *Id.* at 892-93.

The price threshold requirement found in Kerr-McGee's Mandatory Royalty Relief leases is similarly unlawful under the plan text of the DWRRA because

DWRRA's Section 304, applying to new leases, clearly requires minimum royalty relief. The Interior has no discretion to enact a price threshold requirement that applies to volumes below the minimum volume of royalty-free production. Because the Interior imposed price threshold requirements on Kerr-McGee's eight deepwater leases that would require Kerr-McGee to pay millions of dollars in royalties before it had even produced the minimum volume of royalty-free production, the Interior exceeded its Congressional authority. Thus, under *Chevron*'s first step, the Interior's action is unlawful because it contradicts the plain, unambiguous text of the statute.

B.) The Interior's Affirmative Defenses

The Interior argues that even if the agency action was contrary to law, several affirmative contractual defenses apply that nonetheless require Kerr-McGee to pay royalties in accordance with the price threshold language in its contract. Both parties now agree that the first two defenses are moot. The remaining three defenses that the Interior proffers are: 1.) estoppel, 2.) waiver, and 3.) mutual mistake. The Interior is not moving for summary judgment on the remaining three defenses, and contends that there are outstanding issues of material fact that preclude summary judgment on these defenses. Kerr-McGee does, however, move for summary judgment as a matter of law on these defenses.

It is well settled that "if government officials make a contract they are not authorized to make, in violation of a law enacted for the contractor's protection, the contractor is not bound by estoppel, acquiescence, or failure to protest." *LaBarge Products Inc. v. West*, 46 F.3d

1547, 1552 (Fed. Cir. 1995); *see also Tesoro Hawaii Corp. v. United States*, 405 F.3d 1339 (Fed. Cir. 2005) (holding that the Government's defenses of estoppel and waiver did not apply because such remedies are not available when the government makes illegal contracts). The Interior also argued contractual defenses applied in *Santa Fe Snyder*, but the *Santa Fe* court rejected these arguments, noting that the issue of mandatory relief levels was based on statutory interpretation, not contractual interpretation. *Id.*

Because contractual defenses are not available when the Government makes a contract contrary to law, the Interior's affirmative defenses are unavailing. Accordingly, Interior's affirmative defenses will be dismissed as a matter of law.

Lake Charles, Louisiana, this 18 day of October 2007.

/s/ P MINALDI
PATRICIA MINALDI
United States District Judge

APPENDIX C

United States Department
of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

JAN 6 2006

CERTIFIED MAIL—
RETURN RECEIPT REQUESTED

Dennis Bardin
Supervisor of Regulatory Accounting
Kerr-McGee Oil and Gas Corporation
16666 Northchase
Houston, TX 77060-6001

Re: Order to Report and Pay Royalties and Interest Due under Identified Offshore Federal Oil and Gas Leases

Dear Mr. Bardin:

The Department of the Interior hereby orders Kerr-McGee Oil and Gas Corporation ("Kerr-McGee") to calculate, report, and pay royalties on production from the following Federal offshore leases located on the Gulf of Mexico outer Continental Shelf, as explained more fully below:

Lease Number	Block
0540222950	East Breaks Block 689
0540222960	East Breaks Block 690
0540190840	Garden Banks Block 197
0540190280	East Breaks Block 599
0540174060	Garden Banks Block 667
0540174070	Garden Banks Block 668
0540174080	Garden Banks Block 669
0540173070	Garden Banks Block 201

The eight leases listed above will be referred to collectively as the "Kerr-McGee Leases."

Background

A. Section 304 of the Deep Water Royalty Relief Act of 1995 and the Decision of the Fifth Circuit in *Santa Fe Snyder Corp., et al.* v. *Norton*

On six separate dates (February 14, 2003; March 19, 2003; January 20, 2004; February 26, 2004; March 12, 2004; and December 14, 2004), the Minerals Management (MMS), Gulf of Mexico Region, notified you that the Kerr-McGee Leases qualified for royalty relief under section 304 of the Deep Water Royalty Relief Act of 1995 (DWRRA), Pub. L. No. 104-58, 109 Stat. 563, 565, 43 U.S.C. § 1337 note, and implementing regulations in 30 C.F.R. §§ 260.113 - 260.117 (2001-present).[1]

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[1] Predecessor rules implementing DWRRA section 304 were codified to the former 30 C.F.R. § 260.110(d) (1996-2000).

Section 304 required the Secretary of the Interior to use the bidding system of section 8(a)(1)(H) of the Outer Continental Shelf Lands Act of 1953, 43 U.S.C. § 1337(a)(1)(H) (added by DWRRA section 303, 109 Stat. 565), in all sales of deep water leases conducted within the first 5 years after the date of the DWRRA's enactment (*i.e.*, during the period between November 28, 1995, and November 28, 2000). The Kerr-McGee Leases were issued under section 304. Section 304 was discussed in the decision of the United States Court of Appeals for the Fifth Circuit in *Santa Fe Snyder Corp., et al. v. Norton*, 385 F.3d 884 (5th Cir. 2004). That case involved a challenge to certain of the Department's regulations implementing section 304 that affected the calculation of royalty suspension volumes if a section 304 lease was assigned to a field that was producing before the DWRRA was enacted or if a field included more than one section 304 lease.

B. Price Threshold Lease Terms for Leases Issued in 1996, 1997, and 2000

Leases issued under section 304 in the lease sales held in 1996, 1997, and 2000, including the Kerr-McGee Leases, make the royalty relief discussed above subject to specified price thresholds. The price thresholds apply regardless of whether a lease is part of a field that produced before November 28, 1995 (the DWRRA's enactment) or is part of a larger field with more than one section 304 lease. The price thresholds are incorporated in the express terms of the lease and in the terms of the notices of sale under which the leases were issued.

The lease terms provide that if the arithmetic average of the closing prices on the New York Mercantile Ex-

change ("NYMEX") for crude oil or natural gas exceeds a specified level in any year, the lessee must pay royalties at the rate stipulated in the lease on all oil or gas produced during the year. (The year refers to any calendar year, and the threshold prices are adjusted in subsequent years for inflation by the GDP implicit price deflator.) That production also counts against the section 304 royalty suspension volume.

Specifically, for the Kerr-McGee Leases issued in Lease Sale 161 (Lease nos. 0540174060, 0540174070, 0540174080, and 0540173070) and in Lease Sale 168 (Lease nos. 0540190840 and 0540190280), the lease terms at Lease Addendum paragraph k provide:

> In any given year during which the arithmetic average of the closing prices on the New York Mercantile Exchange for light sweet crude oil exceeds $28.00 per barrel, royalties on the production of oil must be paid at the lease stipulated royalty rate, and production during such years counts toward the royalty suspension volume. In any year during which the arithmetic average of the closing prices on the New York Mercantile Exchange for natural gas exceeds $3.50 per million British thermal unit, royalties on the production of natural gas must be paid at the lease stipulated royalty rate, and production during such years counts toward the royalty suspension volume. These prices for oil and natural gas are as of the end of 1994 and must be adjusted for subsequent years by the percentage by which the implicit price deflator for the gross domestic product changed during the preceding calendar year.

For the Kerr-McGee Leases issued in Lease Sale 177 (Lease nos. 0540222950 and 0540222960), lease terms at Lease Addendum section 6 provide:

> In any year during which the arithmetic average of the closing prices on the New York Mercantile Exchange (NYMEX) for light sweet crude oil exceeds $28.00 per barrel (threshold oil price), royalties on the production of oil must be paid at the lease stipulated royalty rate, and production during such years counts toward the royalty suspension volume.
>
> In any year during which the arithmetic average of the closing prices on the NYMEX for natural gas exceeds $3.50 per million British thermal units (threshold gas price), royalties on the production of natural gas must be paid at the lease stipulated royalty rate, and production during such years counts toward the royalty suspension volume.
>
> These prices for oil and natural gas are as of 1994 and must be adjusted for subsequent years by the percentage by which the implicit price deflator for the gross domestic product changed during the preceding calendar year. For 1999, the threshold oil price was $30.40, compared to a $19.26 average NYMEX oil price in 1999. For 1999, the threshold gas price was $3.80, compared to $2.31 average NYMEX gas price in 1999.

The substantive meaning of both of the quoted lease terms is identical.

Under these lease terms, MMS' Offshore Minerals Management ("OMM") computes the price threshold in any particular year for the Kerr-McGee Leases using the

year over year (*i.e.*, current year/previous year) GDP Implicit Price Deflator to calculate the applicable inflation rate. The inflation rate is multiplied by the price threshold for the previous year. For example, to calculate the 2004 oil price threshold of $33.55, divide the Implicit Price Deflator for 2004 (108.22) by the Implicit Price Deflator for 2003 (106.00) and multiply that result by the price threshold for 2003 ($32.86).

The price thresholds derive from specific authority granted in 43 U.S.C. § 1337(a)(1)(H). As mentioned above, section 304 requires the Secretary to use the bidding system of section 1337(a)(1)(H) in all lease sales of deep water leases conducted between November 28, 1995, and November 28, 2000. Section 1337(a)(1)(H) provides for a bidding system of a cash bonus payment and royalty, "and with suspension of royalties for a period, volume, or value of production determined by the Secretary, *which suspension may vary based on the price of production from the lease. . . .*" (Emphasis added.)

The price threshold terms of the leases were not at issue and were not involved in the *Santa Fe Snyder* case. *Santa Fe Snyder* involved a challenge to implementing regulations regarding section 304 leases assigned to a field producing before the DWRRA's enactment and fields with more than one section 304 lease. With regard to those issues, the court said that section 304 imposed an "unambiguous" requirement that all leases issued under that section were entitled to the royalty relief volumes specified in that section without regard to whether the field of which the lease was a part was producing before the DWRRA was enacted, and that the royalty suspension volumes specified in that section

must be applied to each individual lease and not on a "field" basis. 385 F.3d at 891-892. The Fifth Circuit further explained:

> Section 304 requires the Interior [*sic*] to use the bidding system in Section 303 [43 U.S.C. § 1337(a)(1)(H)] which includes discretionary royalty suspension "for a period, volume, or value of production determined by the Secretary." That section, however, immediately excepts and replaces Interior's discretion with a fixed royalty suspension for New Leases on a volume basis by providing, "except that the suspension of royalties shall be set at a volume of not less than the following" (followed by amounts which vary based on water depth).

385 F.3d at 892. There was no mention of the price threshold provision of section 1337(a)(1)(H) or of the price threshold terms of the leases. In fact, the price thresholds are not included in the regulations at issue in *Santa Fe Snyder*. These lease provisions, included pursuant to the Secretary's specific authority in section 1337(a)(1)(H), remain in full force and effect. Kerr-McGee therefore may not avoid enforcement of the price threshold lease provisions on the basis of *Santa Fe Snyder*.

Application of Price Thresholds

In applying the price thresholds, it is necessary to know when production began. Production from the respective Kerr-McGee Leases began in the month indicated below:

Lease Number	Beginning Production Month
0540222950	May 2003
0540222960	May 2002
0540190840	February 2004
0540190280	October 2004
0540174060	December 2003
0540174070	December 2003
0540174080	December 2003
0540173070	November 2002

Therefore, 2002 is the earliest year for which price thresholds are relevant for any of the Kerr-McGee Leases.

Using the formula in the lease terms discussed above, the price thresholds for gas for each Calendar Year (CY) from 2002 through 2004 are:

2002	2003	2004
$4.03	$4.11	$4.19

For CYs 2002 through 2004, MMS/OMM calculated the arithmetic average of the NYMEX closing prices for gas from data published on the Oilnergy.com website. Each day this source reports the closing price for the nearest delivery month (*e.g.*, for most of March the price is for deliveries in April, before changing to May deliveries for about the last 5 trading days in March), as well as an average of these values over the previous 2 months. Monthly averages are calculated based on all days in the month, repeating the value from the last previous trading day for non-trading days, such as weekends and holidays. OMM collects these monthly figures for gas and averages each series over the 12 months in the calendar

year to calculate the average of the gas closing prices on the NYMEX for the year. This information is posted on MMS' website http://www.mms.gov/econ/DWRRA Price1.htm.

The arithmetic averages of the NYMEX gas closing prices for CYs 2002 through 2004 are:

2002	2003	2004
$3.36	$5.49	$6.18

It is readily apparent from this information that the gas price threshold for the Kerr-McGee Leases was exceeded in CYs 2003 and 2004, but not in CY 2002. Therefore, Kerr-McGee owes royalties on gas produced from the identified leases during CYs 2003 and 2004.

Further, using the formula in the lease terms, the oil price thresholds for each CY from 2002 through 2004 are as follows:

2002	2003	2004
$32.27	$32.86	$33.55

The arithmetic average of the NYMEX oil closing prices is calculated in the same manner as the arithmetic average of the NYMEX gas closing prices explained above.

The arithmetic averages of the NYMEX oil closing prices for CYs 2002 through 2004 are:

2002	2003	2004
$26.10	$31.08	$41.38

This information shows that the oil price threshold for the Kerr-McGee Leases was exceeded in CY 2004. Kerr-McGee therefore owes royalties on oil produced from the Kerr-McGee Leases during CY 2004.

Late Payment Interest

Section 111(a) of the Federal Oil and Gas Royalty Management Act of 1982 ("FOGRMA"), 30 U.S.C. § 1721(a), provides:

> In the case of oil and gas leases where royalty payments are not received by the Secretary on the date that such payments are due, or are less than the amount due, the Secretary shall charge interest on such late payments or underpayments at the rate applicable under section 6621 of Title 26. In the case of an underpayment or partial payment, interest shall be computed and charged only on the amount of the deficiency and not on the total amount due.

Subsection (f) of section 1721 further provides:

> Interest shall be charged under this section only for the number of days a payment is late.

Implementing MMS regulations at 30 C.F.R. § 218.54 provide, in relevant part:

> (a) An interest charge shall be assessed on unpaid and underpaid amounts from the date the amounts are due.
>
> (b) The interest charge on late payments shall be at the underpayment rate established by the Internal Revenue Code, 26 U.S.C. 6621(a)(2) (Supp. 1987).

> (c) Interest will be charged only on the amount of the payment not received. Interest will be charged only for the number of days the payment is late.
>
> * * *

In the ordinary situation, royalty is due at the end of the month following the month of production. (*See* 30 C.F.R. § 218.50(a) (2005) and relevant lease terms.) Therefore, in the usual case, late payment interest accrues on unpaid amounts after that date. Under DWRRA section 304 leases, however, royalties were not paid on the usual monthly basis because of the royalty suspension provisions. Kerr-McGee now owed royalties because the price thresholds were exceeded.

The question then becomes when a royalty payment is "late" under these circumstances. The statutory provisions (DWRRA section 304 and 43 U.S.C. § 1337(a)(1)(H) and the lease terms are silent on the specific question of when royalty is due if the price thresholds are exceeded. (There are no MMS regulations that address the price thresholds for section 304 leases.) The royalty suspension provisions apply unless and until the average of the NYMEX closing prices has exceeded the price threshold *for the year*. That calculation cannot be made until after the calendar year ends. The lessee does not owe royalty under the price thresholds until after the year closes. A payment therefore cannot be "late" until sometime after the calendar year ends. Under section 304 leases, the fact that royalty becomes due as a result of the price threshold having been exceeded does not make the due date of a royalty payment retroactive to the end of the month following the month of production.

Once the objective fact that the average of the NYMEX closing prices for the calendar year has exceeded the price threshold occurs, royalty is owed on production during that year as a matter of law under the lease terms. Royalty necessarily becomes due, and late payment interest begins to accrue, no later than a reasonable time after the end of the calendar year, because lessees must be able to calculate the average NYMEX closing prices.

In determining what constitutes a reasonable time, we note that the MMS regulations applicable to the price thresholds for discretionary royalty relief for pre-November 1995 leases and post-November 2000 leases (*i.e.*, leases to which DWRRA section 304 does not apply) prescribe such a time. Specifically, these paragraphs require payment of royalty in the event price thresholds are exceeded by March 31 of the year after the year in which that contingency occurs. 30 C.F.R. § 203.78(a)(1) and (b)(1).[2]

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[2] Title 30 C.F.R. § 203.78(a)(1) and (b)(1) also provide that lessees who owe royalty as a result of price thresholds having been exceeded must pay interest beginning with the month after the month of production. On the surface, that appears to be opposed to the principle stated above, *i.e.*, the fact that royalty becomes due as a result of the price threshold having been exceeded does not make the due date of a royalty payment retroactive to the end of the month following the month of production. However, section 203.78(a) and (b) reflect a unique statutory provision included in section 302 of the DWRRA, 43 U.S.C. § 1337(a)(3)(C). DWRRA section 302 provides for discretionary royalty relief for leases already in existence in November 1995 if "new production" (as defined in the statute) from such leases would not be economic without royalty relief. Section 1337(a)(3)(C)(v) and (vi) require that if the price thresholds prescribed in those clauses for oil and gas, respectively, are exceeded, "any production of [oil or gas] will be subject to royalties at the lease stipulated royalty rate." These clauses

If three months after the close of the calendar year is a reasonable period in which to calculate the average NYMEX closing prices and to calculate and report any royalties due in the context of price thresholds for discretionary royalty relief for leases not subject to DWRRA section 304, it would also be a reasonable time to perform the same functions under section 304 leases.[3]

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then further provide that "[e]stimated royalty payments will be made if such average of the closing prices for the previous year exceeds $28.00. After the end of the calendar year, when the new average price can be calculated, lessees will pay any royalty due, with interest but without penalty, or can apply for a refund, with interest, of any overpayment." Section 203.78(a) and (b) in the regulations implement this requirement (and also extend it by rule to post-November 2000 leases under the general royalty relief authority granted in 43 U.S.C. § 1337(a)(3)(B)). DWRRA section 304 contains no analogous provisions requiring estimated payments if the price thresholds were exceeded in the preceding year with a subsequent "true up" after the end of the calendar year. Thus, similar interest requirements beginning with the month after the month of production would not apply to the Kerr-McGee Leases.

[3] It may be argued that because royalty is due at the end of the month following the month of production unless royalty suspension provisions apply, royalty becomes due immediately once the suspension provisions no longer apply as a result of the price threshold contingency having occurred. Under such a view, royalty would be due at the end of the first month of production following the year in which the price thresholds were exceeded (*i.e.*, the end of January of the following year, which also would be the due date for royalties owed on production in December). Nor would it appear unreasonable to expect that lessees could calculate average NYMEX closing prices and calculate royalties due for the year within a month after the year closes. Under that approach, late payment interest would begin to accrue after January 31. However, the regulations discussed above applicable to royalty relief for leases not subject to section 304 did not take that position, and this decision is consistent with the approach taken in those rules—a result favorable to the lessee.

Therefore, Kerr-McGee must calculate and pay late payment interest beginning on April 1 of the year after the year in which a price threshold was exceeded.

Ownership Interest in the Kerr-McGee Leases

Section 6(g) of the Federal Oil and Gas Royalty Simplification and Fairness Act of 1996, Pub. L. No. 104-185, 110 Stat. 1700, 1715, amended FOGRMA section 102(a), 30 U.S.C. § 1712(a), to provide in relevant part:

> . . . A lessee may designate a person to make all or part of the payments due under a lease on the lessee's behalf and shall notify the Secretary or the applicable delegated State in writing of such designation, in which event said designated person may, in its own name, pay, offset or credit monies, make adjustments, request and receive refunds and submit reports with respect to payments required by the lessee. Notwithstanding any other provision of this Act to the contrary, a designee shall not be liable for any payment obligation under the lease. *The person owning operating rights in a lease shall be primarily liable for its pro rata share of payment obligations under the lease.* If the person owning the legal record title in a lease is other than the operating rights owner, the person owning the legal record title shall be secondarily liable for its pro rata share of such payment obligations under the lease. (Emphasis added.)

The MMS records indicate that during the relevant periods covered by this decision, Kerr-McGee owned (and presently owns):

- 50 percent of the working interest in Lease nos. 0540174060, 0540174070, 0540174080, 0540222950, and 0540222960. Other co-lessees own the other 50 percent of the working interest. According to MMS records, operating rights have not been severed from the record title interest.

- 66.67 percent of the operating rights (and essentially the same proportion (66.66663 percent) of the record title interest) in Lease no. 0540190840. Other interest holders own the remaining 33.33 percent of both the operating rights and the record title interest.

- 33.3333 percent of the working interest in Lease no. 0540190280. Other interest holders own the remaining 66.6667 percent of the working interest. According to MMS records, operating rights have not been severed from the record title interest.

- 25 percent of the operating rights from the surface of the earth down through 15,000 feet and 16.6667 percent of the operating rights from 15,000 feet through 50,000 feet (but none of the record title interest) in Lease no. 0540173070. Other interest holders own the remaining 75 percent and 83.33 percent, respectively, of the operating rights in the identified depth zones. Yet another interest holder owns 100 percent of the record title interest.

Requirement to Calculate and Pay Royalties and Interest

Gas

For the reasons explained above, Kerr-McGee is hereby ordered to calculate, report, and pay royalties on the percentage of all volumes of gas removed or sold from each of the Kerr-McGee Leases during CYs 2003 and 2004 that corresponds to its respective working interest or operating rights ownership percentage in each lease.[4]

Kerr-McGee is also ordered to calculate, report, and pay late payment interest under 30 U.S.C. § 1721(a) and 30 C.F.R. § 218.54 beginning on:

- April 1, 2004, for royalties due on production in CY 2003 and continuing until payment is made to MMS; and
- April 1, 2005, for royalties due on production in CY 2004 and continuing until payment is made to MMS.

Oil

Kerr-McGee is further ordered to calculate, report, and pay royalties on the percentage of all volumes of oil removed or sold from each of the Kerr-McGee Leases during CY 2004 that corresponds to Kerr-McGee's respective operating rights ownership percentage in each lease, together with late payment interest under 30 U.S.C. § 1721(a) and 30 C.F.R. § 218.54 beginning on April 1, 2005, until payment is made to MMS.

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[4] The requirement to pay royalties does not apply to production that is not royalty bearing in the absence of royalty relief, such as gas that is unavoidably lost or gas used on or for the benefit of the lease.

Kerr-McGee is further ordered to submit its reports and payments within 45 days after receipt of this Order.

How to Report and Pay

Under 30 C.F.R. § 210.20, you must report electronically unless you are exempted under 30 C.F.R. § 210.22. Under 30 C.F.R. § 218.51, you must pay electronically unless it is not cost-effective or practical to do so. When reporting and paying:

- Use procedures outlined in 30 C.F.R. § 210.21 for electronic reporting of Form MMS-2014. Complete reporting instructions are found in chapter 9 of the *Minerals Revenue Reporter Handbook—Oil, Gas, and Geothermal Resources.* This information is also on the MMS website at www.mrm.mms.gov.
- Use procedures outlined in 30 C.F.R. § 218.51(b) for electronic payments and the Automated Clearing House/FEDWIRE instructions on the MMS website at www.mrm.mms.gov/ReportingServices/ElecRepting. Be sure to reference the Form MMS-2014 block 4 number in the electronic payment document. Use adjustment reason code 17 on your Form MMS-2014. Place the number 82029718 in block 4.

If you need assistance in reporting and paying, please call (800) 525-0309.

Consequences of Noncompliance

If you fail to comply with this decision, MMS may assess civil penalties under FOGRMA section 109, 30 U.S.C. § 1719, and implementing regulations at 30 C.F.R. Part 241. The Department of the Interior may also seek judi-

cial enforcement of this decision and pursue any other available remedies.

Final Departmental Decision

Because this decision is issued by an Assistant Secretary of the Department of the Interior, it constitutes the final action of the Department and is not appealable to the Interior Board of Land Appeals. *Blue Star, Inc.*, 41 IBLA 333 (1979); *Marathon Oil Co.*, 102 IBLA 177 (1989).

Sincerely,

/s/ JOHNNIE BURTON
R.M. "Johnnie" Burton
Acting Assistant Secretary
Land and Minerals Management

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-30069

KERR-MCGEE OIL AND GAS CORP.,
PLAINTIFF-APPELLEE

v.

UNITED STATES DEPARTMENT OF INTERIOR;
C. STEPHEN ALLRED, ASSISTANT SECRETARY, ON
BEHALF OF LAND & MINERALS MANAGEMENT, ON
BEHALF OF UNITED STATES DEPARTMENT OF
INTERIOR, DEFENDANTS-APPELLANTS

[Filed: Apr. 14, 2009]

Appeal from the United States District Court for the
Western District of Louisiana at Lake Charles

ON PETITION FOR REHEARING EN BANC

(Opinion_____, 5 Cir., _____, _____ F.3d _____)

Before: KING, DENNIS, and ELROD, Circuit Judges.

PER CURIAM:

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ CAROLYN DINEEN KING
United States Circuit Judge

APPENDIX E

1. 43 U.S.C. 1334 provides in pertinent part:

Administration of leasing

(a) Rules and regulations; amendment; cooperation with State agencies; subject matter and scope of regulations

The Secretary shall administer the provisions of this subchapter relating to the leasing of the outer Continental Shelf, and shall prescribe such rules and regulations as may be necessary to carry out such provisions. The Secretary may at any time prescribe and amend such rules and regulations as he determines to be necessary and proper in order to provide for the prevention of waste and conservation of the natural resources of the outer Continental Shelf, and the protection of correlative rights therein, and, notwithstanding any other provisions herein, such rules and regulations shall, as of their effective date, apply to all operations conducted under a lease issued or maintained under the provisions of this subchapter. In the enforcement of safety, environmental, and conservation laws and regulations, the Secretary shall cooperate with the relevant departments and agencies of the Federal Government and of the affected States. In the formulation and promulgation of regulations, the Secretary shall request and give due consideration to the views of the Attorney General with respect to matters which may affect competition. In considering any regulations and in preparing any such views, the Attorney General shall consult with the Federal Trade Commission. The regulations prescribed by

the Secretary under this subsection shall include, but not be limited to, provisions—

(1) for the suspension or temporary prohibition of any operation or activity, including production, pursuant to any lease or permit (A) at the request of a lessee, in the national interest, to facilitate proper development of a lease or to allow for the construction or negotiation for use of transportation facilities, or (B) if there is a threat of serious, irreparable, or immediate harm or damage to life (including fish and other aquatic life), to property, to any mineral deposits (in areas leased or not leased), or to the marine, coastal, or human environment, and for the extension of any permit or lease affected by suspension or prohibition under clause (A) or (B) by a period equivalent to the period of such suspension or prohibition, except that no permit or lease shall be so extended when such suspension or prohibition is the result of gross negligence or willful violation of such lease or permit, or of regulations issued with respect to such lease or permit;

(2) with respect to cancellation of any lease or permit—

(A) that such cancellation may occur at any time, if the Secretary determines, after a hearing, that—

(i) continued activity pursuant to such lease or permit would probably cause serious harm or damage to life (including fish and other aquatic life), to property, to any mineral (in areas leased or not leased), to the national secu-

rity or defense, or to the marine, coastal, or human environment;

(ii) the threat of harm or damage will not disappear or decrease to an acceptable extent within a reasonable period of time; and

(iii) the advantages of cancellation outweigh the advantages of continuing such lease or permit force;

(B) that such cancellation shall not occur unless and until operations under such lease or permit shall have been under suspension, or temporary prohibition, by the Secretary, with due extension of any lease or permit term continuously for a period of five years, or for a lesser period upon request of the lessee;

(C) that such cancellation shall entitle the lessee to receive such compensation as he shows to the Secretary as being equal to the lesser of (i) the fair value of the canceled rights as of the date of cancellation, taking account of both anticipated revenues from the lease and anticipated costs, including costs of compliance with all applicable regulations and operating orders, liability for cleanup costs or damages, or both, in the case of an oilspill, and all other costs reasonably anticipated on the lease, or (ii) the excess, if any, over the lessee's revenues, from the lease (plus interest thereon from the date of receipt to date of reimbursement) of all consideration paid for the lease and all direct expenditures made by the lessee after the date of issuance of such lease and in connection with exploration or development, or

both, pursuant to the lease (plus interest on such consideration and such expenditures from date of payment to date of reimbursement), except that (I) with respect to leases issued before September 18, 1978, such compensation shall be equal to the amount specified in clause (i) of this subparagraph; and (II) in the case of joint leases which are canceled due to the failure of one or more partners to exercise due diligence, the innocent parties shall have the right to seek damages for such loss from the responsible party or parties and the right to acquire the interests of the negligent party or parties and be issued the lease in question;

(3) for the assignment or relinquishment of a lease;

(4) for unitization, pooling, and drilling agreements;

(5) for the subsurface storage of oil and gas from any source other than by the Federal Government;

(6) for drilling or easements necessary for exploration, development, and production;

(7) for the prompt and efficient exploration and development of a lease area; and

(8) for compliance with the national ambient air quality standards pursuant to the Clean Air Act (42 U.S.C. 7401 et seq.), to the extent that activities authorized under this subchapter significantly affect the air quality of any State.

* * * * *

2. 43 U.S.C. 1337 provides in pertinent part:

Leases, easements, and rights-of-way on the outer Continental Shelf

(a) Oil and gas leases; award to highest responsible qualified bidder; method of bidding; royalty relief; Congressional consideration of bidding system; notice

(1) The Secretary is authorized to grant to the highest responsible qualified bidder or bidders by competitive bidding, under regulations promulgated in advance, any oil and gas lease on submerged lands of the outer Continental Shelf which are not covered by leases meeting the requirements of subsection (a) of section 1335 of this title. Such regulations may provide for the deposit of cash bids in an interest-bearing account until the Secretary announces his decision on whether to accept the bids, with the interest earned thereon to be paid to the Treasury as to bids that are accepted and to the unsuccessful bidders as to bids that are rejected. The bidding shall be by sealed bid and, at the discretion of the Secretary, on the basis of—

(A) cash bonus bid with a royalty at not less than 12½ per centum fixed by the Secretary in amount or value of the production saved, removed, or sold;

(B) variable royalty bid based on a per centum in amount or value of the production saved, removed, or sold, with either a fixed work commitment based on dollar amount for exploration or a fixed cash bonus as determined by the Secretary, or both;

(C) cash bonus bid, or work commitment bid based on a dollar amount for exploration with a fixed cash bonus, and a diminishing or sliding royalty

based on such formulae as the Secretary shall determine as equitable to encourage continued production from the lease area as resources diminish, but not less than 12½ per centum at the beginning of the lease period in amount or value of the production saved, removed, or sold;

(D) cash bonus bid with a fixed share of the net profits of no less than 30 per centum to be derived from the production of oil and gas from the lease area;

(E) fixed cash bonus with the net profit share reserved as the bid variable;

(F) cash bonus bid with a royalty at no less than 12½ per centum fixed by the Secretary in amount or value of the production saved, removed, or sold and a fixed per centum share of net profits of no less than 30 per centum to be derived from the production of oil and gas from the lease area;

(G) work commitment bid based on a dollar amount for exploration with a fixed cash bonus and a fixed royalty in amount or value of the production saved, removed, or sold;

(H) cash bonus bid with royalty at no less than 12 and ½ per centum fixed by the Secretary in amount or value of production saved, removed, or sold, and with suspension of royalties for a period, volume, or value of production determined by the Secretary, which suspensions may vary based on the price of production from the lease; or

(I) subject to the requirements of paragraph (4) of this subsection, any modification of bidding sys-

tems authorized in suparagraphs (A) through (G), or any other systems of bid variables, terms, and conditions which the Secretary determines to be useful to accomplish the purposes and policies of this subchapter, except that no such bidding system or modification shall have more than one bid variable.

(2) The Secretary may, in his discretion, defer any part of the payment of the cash bonus, as authorized in paragraph (1) of this subsection, according to a schedule announced at the time of the announcement of the lease sale, but such payment shall be made in total no later than five years after the date of the lease sale.

(3)(A) The Secretary may, in order to promote increased production on the lease area, through direct, secondary, or tertiary recovery means, reduce or eliminate any royalty or net profit share set forth in the lease for such area.

(B) In the Western and Central Planning Areas of the Gulf of Mexico and the portion of the Eastern Planning Area of the Gulf of Mexico encompassing whole lease blocks lying west of 87 degrees, 30 minutes West longitude and in the Planning Areas offshore Alaska, the Secretary may, in order to—

(i) promote development or increased production on producing or non-producing leases; or

(ii) encourage production of marginal resources on producing or non-producing leases;

through primary, secondary, or tertiary recovery means, reduce or eliminate any royalty or net profit share set forth in the lease(s). With the lessee's consent, the Secretary may make other modifications to the royalty or

net profit share terms of the lease in order to achieve these purposes.

(C)(i) Notwithstanding the provisions of this subchapter other than this subparagraph, with respect to any lease or unit in existence on November 28, 1995, meeting the requirements of this subparagraph, no royalty payments shall be due on new production, as defined in clause (iv) of this subparagraph, from any lease or unit located in water depths of 200 meters or greater in the Western and Central Planning Areas of the Gulf of Mexico, including that portion of the Eastern Planning Area of the Gulf of Mexico encompassing whole lease blocks lying west of 87 degrees, 30 minutes West longitude, until such volume of production as determined pursuant to clause (ii) has been produced by the lessee.

(ii) Upon submission of a complete application by the lessee, the Secretary shall determine within 180 days of such application whether new production from such lease or unit would be economic in the absence of the relief from the requirement to pay royalties provided for by clause (i) of this subparagraph. In making such determination, the Secretary shall consider the increased technological and financial risk of deep water development and all costs associated with exploring, developing, and producing from the lease. The lessee shall provide information required for a complete application to the Secretary prior to such determination. The Secretary shall clearly define the information required for a complete application under this section. Such application may be made on the basis of an individual lease or unit. If the Secretary determines that such new production would be economic in the absence of the relief from the requirement to pay royalties provided for by

clause (i) of this subparagraph, the provisions of clause (i) shall not apply to such production. If the Secretary determines that such new production would not be economic in the absence of the relief from the requirement to pay royalties provided for by clause (i), the Secretary must determine the volume of production from the lease or unit on which no royalties would be due in order to make such new production economically viable; except that for new production as defined in clause (iv)(I), in no case will that volume be less than 17.5 million barrels of oil equivalent in water depths of 200 to 400 meters, 52.5 million barrels of oil equivalent in 400-800 meters of water, and 87.5 million barrels of oil equivalent in water depths greater than 800 meters. Redetermination of the applicability of clause (i) shall be undertaken by the Secretary when requested by the lessee prior to the commencement of the new production and upon significant change in the factors upon which the original determination was made. The Secretary shall make such redetermination within 120 days of submission of a complete application. The Secretary may extend the time period for making any determination or redetermination under this clause for 30 days, or longer if agreed to by the applicant, if circumstances so warrant. The lessee shall be notified in writing of any determination or redetermination and the reasons for and assumptions used for such determination. Any determination or redetermination under this clause shall be a final agency action. The Secretary's determination or redetermination shall be judicially reviewable under section 702 of title 5, only for actions filed within 30 days of the Secretary's determination or redetermination.

(iii) In the event that the Secretary fails to make the determination or redetermination called for in clause (ii)

upon application by the lessee within the time period, together with any extension thereof, provided for by clause (ii), no royalty payments shall be due on new production as follows:

(I) For new production, as defined in clause (iv)(I) of this subparagraph, no royalty shall be due on such production according to the schedule of minimum volumes specified in clause (ii) of this subparagraph.

(II) For new production, as defined in clause (iv)(II) of this subparagraph, no royalty shall be due on such production for one year following the start of such production.

(iv) For purposes of this subparagraph, the term "new production" is—

(I) any production from a lease from which no royalties are due on production, other than test production, prior to November 28, 1995; or

(II) any production resulting from lease development activities pursuant to a Development Operations Coordination Document, or supplement thereto that would expand production significantly beyond the level anticipated in the Development Operations Coordination Document, approved by the Secretary after November 28, 1995.

(v) During the production of volumes determined pursuant to clauses[1] (ii) or (iii) of this subparagraph, in any year during which the arithmetic average of the

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[1] So in original. Probably should be "clause".

closing prices on the New York Mercantile Exchange for light sweet crude oil exceeds $28.00 per barrel, any production of oil will be subject to royalties at the lease stipulated royalty rate. Any production subject to this clause shall be counted toward the production volume determined pursuant to clause (ii) or (iii). Estimated royalty payments will be made if such average of the closing prices for the previous year exceeds $28.00. After the end of the calendar year, when the new average price can be calculated, lessees will pay any royalties due, with interest but without penalty, or can apply for a refund, with interest, of any overpayment.

(vi) During the production of volumes determined pursuant to clause (ii) or (iii) of this subparagraph, in any year during which the arithmetic average of the closing prices on the New York Mercantile Exchange for natural gas exceeds $3.50 per million British thermal units, any production of natural gas will be subject to royalties at the lease stipulated royalty rate. Any production subject to this clause shall be counted toward the production volume determined pursuant to clauses[1] (ii) or (iii). Estimated royalty payments will be made if such average of the closing prices for the previous year exceeds $3.50. After the end of the calendar year, when the new average price can be calculated, lessees will pay any royalties due, with interest but without penalty, or can apply for a refund, with interest, of any overpayment.

(vii) The prices referred to in clauses (v) and (vi) of this subparagraph shall be changed during any calendar year after 1994 by the percentage, if any, by which the

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[1] So in original. Probably should be "clause".

implicit price deflator for the gross domestic product changed during the preceding calendar year.

(4)(A) The Secretary of Energy shall submit any bidding system authorized in subparagraph (H) of paragraph (1) to the Senate and House of Representatives. The Secretary may institute such bidding system unless either the Senate or the House of Representatives passes a resolution of disapproval within thirty days after receipt of the bidding system.

(B) Subparagraphs (C) through (J) of this paragraph are enacted by Congress—

(i) as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such they are deemed a part of the rules of each House, respectively, but they are applicable only with respect to the procedures to be followed in that House in the case of resolutions described by this paragraph, and they supersede other rules only to the extent that they are inconsistent therewith; and

(ii) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner, and to the same extent as in the case of any other rule of that House.

(C) A resolution disapproving a bidding system submitted pursuant to this paragraph shall immediately be referred to a committee (and all resolutions with respect to the same request shall be referred to the same committee) by the President of the Senate or the Speaker of the House of Representatives, as the case may be.

(D) If the committee to which has been referred any resolution disapproving the bidding system of the Secretary has not reported the resolution at the end of ten calendar days after its referral, it shall be in order to move either to discharge the committee from further consideration of the resolution or to discharge the committee from further consideration of any other resolution with respect to the same bidding system which has been referred to the committee.

(E) A motion to discharge may be made only by an individual favoring the resolution, shall be highly privileged (except that it may not be made after the committee has reported a resolution with respect to the same recommendation), and debate thereon shall be limited to not more than one hour, to be divided equally between those favoring and those opposing the resolution. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

(F) If the motion to discharge is agreed to or disagreed to, the motion may not be renewed, nor may another motion to discharge the committee be made with respect to any other resolution with respect to the same bidding system.

(G) When the committee has reported, or has been discharged from further consideration of, a resolution as provided in this paragraph, it shall be at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. The motion shall be highly privileged and shall not be debatable. An amendment to the motion shall not be in order, and it shall not

be in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

(H) Debate on the resolution is limited to not more than two hours, to be divided equally between those favoring and those opposing the resolution. A motion further to limit debate is not debatable. An amendment to, or motion to recommit, the resolution is not in order, and it is not in order to move to reconsider the vote by which the resolution is agreed to or disagreed to.

(I) Motions to postpone, made with respect to the discharge from the committee, or the consideration of a resolution with respect to a bidding system, and motions to proceed to the consideration of other business, shall be decided without debate.

(J) Appeals from the decisions of the Chair relating to the application of the rules of the Senate or the House of Representatives, as the case may be, to the procedure relating to a resolution with respect to a bidding system shall be decided without debate.

(5)(A) During the five-year period commencing on September 18, 1978, the Secretary may, in order to obtain statistical information to determine which bidding alternatives will best accomplish the purposes and policies of this subchapter, require, as to no more than 10 per centum of the tracts offered each year, each bidder to submit bids for any area of the outer Continental Shelf in accordance with more than one of the bidding systems set forth in paragraph (1) of this subsection. For such statistical purposes, leases may be awarded using a bidding alternative selected at random for the acquisition of valid statistical data if such bidding alternative is otherwise consistent with the provisions of this subchapter.

(B) The bidding systems authorized by paragraph (1) of this subsection, other than the system authorized by subparagraph (A), shall be applied to not less than 20 per centum and not more than 60 per centum of the total area offered for leasing each year during the five-year period beginning on September 18, 1978, unless the Secretary determines that the requirements set forth in this subparagraph are inconsistent with the purposes and policies of this subchapter.

(6) At least ninety days prior to notice of any lease sale under subparagraph (D), (E), (F), or, if appropriate, (H) of paragraph (1), the Secretary shall by regulation establish rules to govern the calculation of net profits. In the event of any dispute between the United States and a lessee concerning the calculation of the net profits under the regulation issued pursuant to this paragraph, the burden of proof shall be on the lessee.

(7) After an oil and gas lease is granted pursuant to any of the work commitment options of paragraph (1) of this subsection—

(A) the lessee, at its option, shall deliver to the Secretary upon issuance of the lease either (i) a cash deposit for the full amount of the exploration work commitment, or (ii) a performance bond in form and substance and with a surety satisfactory to the Secretary, in the principal amount of such exploration work commitment assuring the Secretary that such commitment shall be faithfully discharged in accordance with this section, regulations, and the lease; and for purposes of this subparagraph, the principal amount of such cash deposit or bond may, in accordance with regulations, be periodically reduced upon

proof, satisfactory to the Secretary, that a portion of the exploration work commitment has been satisfied;

(B) 50 per centum of all exploration expenditures on, or directly related to, the lease, including, but not limited to (i) geological investigations and related activities, (ii) geophysical investigations including seismic, geomagnetic, and gravity surveys, data processing and interpretation, and (iii) exploratory drilling, core drilling, redrilling, and well completion or abandonment, including the drilling of wells sufficient to determine the size and a real extent of any newly discovered field, and including the cost of mobilization and demobilization of drilling equipment, shall be included in satisfaction of the commitment, except that the lessee's general overhead cost shall not be so included against the work commitment, but its cost (including employee benefits) of employees directly assigned to such exploration work shall be so included; and

(C) if at the end of the primary term of the lease, including any extension thereof, the full dollar amount of the exploration work commitment has not been satisfied, the balance shall then be paid in cash to the Secretary.

(8) Not later than thirty days before any lease sale, the Secretary shall submit to the Congress and publish in the Federal Register a notice—

(A) identifying any bidding system which will be utilized for such lease sale and the reasons for the utilization of such bidding system; and

(B) designating the lease tracts selected which are to be offered in such sale under the bidding sys-

tem authorized by subparagraph (A) of paragraph (1) and the lease tracts selected which are to be offered under any one or more of the bidding systems authorized by subparagraphs (B) through (H) of paragraph (1), and the reasons such lease tracts are to be offered under a particular bidding system.

(b) Terms and provisions of oil and gas leases

An oil and gas lease issued pursuant to this section shall—

(1) be for a tract consisting of a compact area not exceeding five thousand seven hundred and sixty acres, as the Secretary may determine, unless the Secretary finds that a larger area is necessary to comprise a reasonable economic production unit;

(2) be for an initial period of—

(A) five years; or

(B) not to exceed ten years where the Secretary finds that such longer period is necessary to encourage exploration and development in areas because of unusually deep water or other unusually adverse conditions,

and as long after such initial period as oil or gas is produced from the area in paying quantities, or drilling or well reworking operations as approved by the Secretary are conducted thereon;

(3) require the payment of amount or value as determined by one of the bidding systems set forth in subsection (a) of this section;

(4) entitle the lessee to explore, develop, and produce the oil and gas contained within the lease area, conditioned upon due diligence requirements and the approval of the development and production plan required by this subchapter;

(5) provide for suspension or cancellation of the lease during the initial lease term or thereafter pursuant to section 1334 of this title;

(6) contain such rental and other provisions as the Secretary may prescribe at the time of offering the area for lease; and

(7) provide a requirement that the lessee offer 20 per centum of the crude oil, condensate, and natural gas liquids produced on such lease, at the market value and point of delivery applicable to Federal royalty oil, to small or independent refiners as defined in the Emergency Petroleum Allocation Act of 1973 [15 U.S.C. 751 *et seq.*].

* * * * *

3. 43 U.S.C. 1344 provides in pertinent part:

Outer Continental Shelf leasing program

(a) Schedule of proposed oil and gas lease sales

The Secretary, pursuant to procedures set forth in subsections (c) and (d) of this section, shall prepare and periodically revise, and maintain an oil and gas leasing program to implement the policies of this subchapter. The leasing program shall consist of a schedule of proposed lease sales indicating, as precisely as possible, the size, timing, and location of leasing activity which he

determines will best meet national energy needs for the five-year period following its approval or reapproval. Such leasing program shall be prepared and maintained in a manner consistent with the following principles:

(1) Management of the outer Continental Shelf shall be conducted in a manner which considers economic, social, and environmental values of the renewable and nonrenewable resources contained in the outer Continental Shelf, and the potential impact of oil and gas exploration on other resource values of the outer Continental Shelf and the marine, coastal, and human environments.

(2) Timing and location of exploration, development, and production of oil and gas among the oil- and gas-bearing physiographic regions of the outer Continental Shelf shall be based on a consideration of—

(A) existing information concerning the geographical, geological, and ecological characteristics of such regions;

(B) an equitable sharing of developmental benefits and environmental risks among the various regions;

(C) the location of such regions with respect to, and the relative needs of, regional and national energy markets;

(D) the location of such regions with respect to other uses of the sea and seabed, including fisheries, navigation, existing or proposed sealanes, potential sites of deepwater ports, and other an-

ticipated uses of the resources and space of the outer Continental Shelf;

(E) the interest of potential oil and gas producers in the development of oil and gas resources as indicated by exploration or nomination;

(F) laws, goals, and policies of affected States which have been specifically identified by the Governors of such States as relevant matters for the Secretary's consideration;

(G) the relative environmental sensitivity and marine productivity of different areas of the outer Continental Shelf; and

(H) relevant environmental and predictive information for different areas of the outer Continental Shelf.

(3) The Secretary shall select the timing and location of leasing, to the maximum extent practicable, so as to obtain a proper balance between the potential for environmental damage, the potential for the discovery of oil and gas, and the potential for adverse impact on the coastal zone.

(4) Leasing activities shall be conducted to assure receipt of fair market value for the lands leased and the rights conveyed by the Federal Government.

* * * * *

4. Outer Continental Shelf Deep Water Royalty Relief Act, Pub. L. No. 104-58, §§ 304 and 305, 109 Stat. 565-566 (1995), provide:

SEC. 304. LEASE SALES.

For all tracts located in water depths of 200 meters or greater in the Western and Central Planning Area of the Gulf of Mexico, including that portion of the Eastern Planning Area of the Gulf of Mexico encompassing whole lease blocks lying west of 87 degrees, 30 minutes West longitude, any lease sale within five years of the date of enactment of this title, shall use the bidding system authorized in section 8(a)(1)(H) of the Outer Continental Shelf Lands Act, as amended by this title, except that the suspension of royalties shall be set at a volume of not less than the following:

(1) 17.5 million barrels of oil equivalent for leases in water depths of 200 to 400 meters;

(2) 52.5 million barrels of oil equivalent for leases in 400 to 800 meters of water; and

(3) 87.5 million barrels of oil equivalent for leases in water depths greater than 800 meters.

SEC. 305. REGULATIONS.

The Secretary shall promulgate such rules and regulations as are necessary to implement the provisions of this title within 180 days after the enactment of this Act.

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No. 09-54

Supreme Court, U.S.
FILED
AUG 28 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

UNITED STATES DEPARTMENT
OF THE INTERIOR et al.,

Petitioners,

v.

KERR-MCGEE OIL & GAS CORP.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Section 304 of the Outer Continental Shelf Deep Water Royalty Relief Act, which covers a small and diminishing number of oil and gas leases issued in five specific years for specific water depths in a limited geographic area of the Gulf of Mexico and provides that suspension of royalties "shall be set at a volume not less than" the specified amounts set by Congress, authorizes the Secretary of the Interior to reduce or eliminate the suspension of royalties below the minimum volumes mandated by Congress.

RULE 29.6 STATEMENT

Kerr-McGee Oil & Gas Corp. states that its parent corporations are Kerr-McGee Worldwide Corp., Kerr-McGee Corp., and Anadarko Petroleum Corp., and that no other publicly held corporation owns 10% or more of its stock.

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TABLE OF AUTHORITIES

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Sec'y of the Interior v. *California*, 464 U.S. 312 (1984) 23

Smith v. *United States*, 507 U.S. 197 (1993) 24

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Outer Continental Shelf Deep Water Royalty Relief Act, Pub. L. No. 104-58, 109 Stat. 565 (1995):

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30 C.F.R. §§ 203.60-91 12
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61 Fed. Reg. 27263 (May 31, 1996) 12
63 Fed. Reg. 2605 (Jan. 16, 1998) 12
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73 Fed. Reg. 58467 (Oct. 7, 2008) 11

OTHER AUTHORITIES:

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TABLE OF AUTHORITIES—Continued

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Dep't of the Interior, *OCS Study MMS 2001-019, Lafourche Parish and Port Fourchon, Louisiana: Effects of the Outer Continental Shelf Petroleum Industry* (2001) 4, 8

Dep't of the Interior, *OCS Report MMS 2004-021, Deepwater Gulf of Mexico 2004: America's Expanding Frontier* (2004)..... 8

Dep't of the Interior, *OCS Report MMS 2008-013, Deepwater Gulf of Mexico 2008: America's Offshore Energy Future* (2008)..... 10

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IN THE

Supreme Court of the United States

No. 09-54

UNITED STATES DEPARTMENT OF THE INTERIOR et al.,

Petitioners,

v.

KERR-MCGEE OIL & GAS CORP.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

INTRODUCTION

This case meets none of this Court's exacting criteria for certiorari. As it relates to this case, the statute at issue, Section 304 of the Outer Continental Shelf Deep Water Royalty Relief Act ("RRA"), applies only to a small and rapidly diminishing number of oil and gas leases issued in three specific years for limited water depths in a limited geographic area of the Gulf of Mexico (the "Gulf"). Section 304's unique statutory language operated only temporarily: it has not applied to any lease granted in nearly a decade, and it will never apply to any future lease. In an opinion that

petitioners (collectively, "Interior") admit conflicts with no other decision on any point, the Fifth Circuit applied well-settled tools of statutory construction to interpret Section 304's requirement that royalty suspensions "shall be set at a volume not less than" specified amounts of oil and gas production. As the Fifth Circuit correctly held, Congress's mandate unambiguously prohibits Interior from reducing royalty suspensions below the statutory minimums.

This routine, case-specific exercise in statutory construction raises no important legal issue warranting this Court's intervention. Not only does the statute unambiguously refute Interior's position, but the agency's weak claim to deference is belied by the fact that its own regulations for Section 304 leases—and more than a thousand of the leases originally issued under that provision of the RRA—do not include the price thresholds it now seeks to enforce. Contrary to the petition's *post hoc* claim of regulatory support, Interior expressly admitted in its royalty payment order to Kerr-McGee that its regulations for Section 304 leases do not provide for price thresholds. Pet. App. 33a.

Unable to identify any legal issue of overriding national importance, Interior resorts to flawed conjecture about the amount of royalties it might be unable to collect under the Fifth Circuit's straightforward application of Congress's guarantee of minimum royalty suspension volumes. But a case is not rendered appropriate for certiorari merely because of the amount of money a party unlawfully has demanded or speculates it may later demand. And Interior's current claims of national importance cannot be squared with its conduct over more than a decade of administering the RRA. Interior omitted

price thresholds from leases granted at 40% of the relevant lease sales held from 1996-2000 through what it says was "inadvertence." And in 2005, Interior voluntarily acquiesced in a nearly identical Fifth Circuit decision involving the interpretation of the RRA notwithstanding what Interior said were similar monetary impacts.

Now, Interior says it will forego what it admits is one plausible route for seeking large amounts of Section 304 royalties in the Federal Circuit, and entirely ignores another route for asserting claims in other circuits. Interior's voluntary decision not to avail itself of other available options for review undermines its claims of national importance and is no reason for this Court to intervene.

Section 304 achieved Congress's goals, resulting in billions of dollars in risky private investments to explore and develop otherwise untouched deepwater Gulf of Mexico fields, creating thousands of jobs, and generating billions more to the government in upfront bonuses and increased royalties on future leases. The Fifth Circuit simply read this unique statute as it was unambiguously written. The petition should be denied.

COUNTERSTATEMENT

A. The Statute

Before Congress enacted the RRA in 1995, Gulf of Mexico oil and gas production was waning, companies were looking abroad for greater opportunities, and thousands of domestic jobs had been lost. *See* S. Rep. No. 103-248, at 4 (1994); 141 Cong. Rec. 11876 (Nov. 8, 1995) ("[W]e have lost * * * 400,000 jobs in America because of the fact that people are rushing to somebody else's waters,

somebody else's lands to drill because we have made it uninviting to drill and produce in America.") (statement of Rep. Tauzin). By the early 1990's, the Gulf of Mexico had been called the "dead sea," and it appeared that "the area was nearly spent and had no long-term future in oil and gas development." Dep't of the Interior, *OCS Study MMS 2001-019, Lafourche Parish and Port Fourchon, Louisiana: Effects of the Outer Continental Shelf Petroleum Industry* 7 (2001). Although deepwater areas were largely unexplored and potentially promising, companies had not been willing to risk the multi-billion dollar investments necessary to explore those areas on a large scale. *See* 141 Cong. Rec. 11868 (Nov. 8, 1995) ("[I]t may cost lessees anywhere from $75 to $200 million just to determine if oil or gas is present and up to $1 billion to bring production on line.") (statement of Rep. Jackson-Lee).

In response, Congress amended the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 *et seq.* ("OCSLA") by enacting the RRA. Using "royalty suspensions" as a statutory incentive, Congress sought to jump-start investment in one portion of the vast Outer Continental Shelf acreage covered by the OCSLA: deepwater areas in the Central and Western Gulf of Mexico. Section 304 was central to this effort to attract the massive investments that would be required to convert the deepwater Gulf to a producing region. In Section 304, Congress created a temporary statutory program of automatic, unconditional royalty relief limited to new leases in targeted deepwater areas of the Gulf granted during the five-year period after enactment. Section 304 required Interior to grant leases in these areas with royalty suspensions that "shall be set at a volume of

not less than" three specific amounts depending on the water depth of a lease. RRA, Pub. L. No. 104-58, § 304, 109 Stat. 565-66 (1995). This case concerns Kerr-McGee's statutory entitlement under Section 304 to royalty suspensions "of not less than" the Congressional minimums.

Section 304 concerned new leases in the deepwater Gulf, for which it was necessary to attract new investment. Section 302, by contrast, provided a different (and more limited) mechanism and measure of relief for existing leases in the same areas, for which companies had already invested millions of dollars in bonus payments, exploration and other activities. Section 302 authorized royalty relief only where Interior found that "new production" from an existing lease "would not be economic" without royalty relief. 43 U.S.C. § 1337(a)(3)(C)(ii). If such a finding was made, the "new production" would be subject to minimum royalty suspension volumes. *Id.* § 1337(a)(3)(C)(ii), (iv). Congress also expressly withdrew royalty relief under Section 302 for existing leases when annual commodity prices exceed certain thresholds, and provided that production in such a year "shall be counted toward the production volume" otherwise subject to relief. *Id.* § 1337(a)(3)(C)(v)-(vi).

Unlike Section 302, Section 304's royalty suspensions are not limited to "new production," and are not subject to any economic conditions, including price thresholds. This is because Congress recognized that different circumstances called for different incentives. Because owners of existing leases had already invested without the expectation of royalty relief, Congress saddled such owners with the burden of demonstrating that royalty relief was an economic

necessity. And in keeping with this requirement of economic need, Congress precluded royalty relief for existing leases if commodity prices rose. By contrast, Congress mandated the certainty of royalty relief for new leases granted in a limited five-year period as an incentive for companies to take the great financial risk of investing in deepwater exploration.

In addition to hoping to generate massive new investments in the deepwater Gulf, and mindful that companies like Kerr-McGee would need to invest heavily in pre- and post-leasing expenditures, Congress anticipated that with the incentives provided by Section 304 the companies would be willing to pay nonrefundable up-front bonuses at premium prices in order to obtain new leases covered by that section. As one Congressman explained,

> the risk remains entirely with the lessee that hydrocarbon resources will be discovered in paying quantities. If a dry hole is drilled on a deepwater tract, no royalty relief is available, of course, yet a bonus bid will have been paid to the U.S. Treasury, *a bonus bid which will be incrementally larger than it would be without deepwater incentives.*

141 Cong. Rec. H7581 (July 25, 1995) (statement of Rep. Calvert) (emphasis added).

Finally, Congress used Section 303 of the RRA to fill a void in Section 8 of the OCSLA, 43 U.S.C. § 1337, by adding a new bidding system to the series of existing bidding systems that Interior can use to offer offshore leases for sale. Unlike Sections 302 and 304, and consistent with its status as a permanent amendment to the general framework of the offshore leasing program, Section 303 contains neither geographic nor temporal limitations. Rather,

Section 303 applies everywhere the OCSLA applies, from shallow waters in the Gulf to the Pacific to offshore Alaska.

Under the bidding system added by Section 303, potential lessees must make an upfront cash bid on leases with a royalty rate of at least 12.5%. 43 U.S.C. § 1337(a)(1)(H). These cash bids are non-refundable, even if the leased property never produces anything. Section 303 also authorizes Interior to include a "suspension of royalties for a period, volume, or value of production determined by the Secretary, which suspensions may vary based on the price of production from the lease." 43 U.S.C. § 1337(a)(1)(H). The RRA authorized Interior to use the Section 303 bidding system for any lease sale held for any offshore lands after the RRA was enacted, subject to the express exception set forth in Section 304.

While Section 304 required Interior to use this new bidding system for the lease sales covered by that provision, as noted above, Congress expressly determined the minimum royalty suspension volumes for those leases. Thus, whereas Section 303 generally *authorized* the use of a cash bonus bid system and *authorized* Interior both to suspend royalties and to vary that suspension, Section 304, a targeted provision directed at leases granted in a specific area at a specific time, *required* the use of a cash bonus bid system and *required* the suspension of royalties up to certain levels of production. The discretion granted to Interior under Section 303 to "vary" suspensions "determined by *the Secretary*" did not apply to the minimum royalty suspension volumes that *Congress* mandated for Section 304 leases.

The RRA "far exceeded" expectations and "was one of the most successful bills ever passed for devel-

oping domestic energy resources." *National Energy Security Act: Hearing on S. 2557 Before the S. Comm. on Energy and Natural Res.*, 106th Cong. 36 (June 15, 2000) (statement of former Sen. Johnston). In short order, "the Gulf of Mexico went from being termed the 'dead sea' to being referred to as 'America's new frontier.'" *OCS Study MMS 2001-019*, *supra*, at 8.

Deepwater leasing activity "exploded" immediately after the RRA was passed, while shallow-water leasing remained constant. Dep't of the Interior, *OCS Report MMS 2004-021, Deepwater Gulf of Mexico 2004: America's Expanding Frontier* 13, 19 (2004). Between 1993 and 2003, the number of deepwater projects producing oil and gas in the Gulf had jumped from six to eighty-six. *Id.* at 5. In just one decade, deepwater oil production increased eight-fold and gas production sixteen-fold. *Id.* at 13, 19. According to Interior, the "growth in deep water crude oil production has offset production declines in shallow water, allowing total Gulf oil production to grow from 283 million barrels in 1990 to 540 million barrels in 2004." *Natural Gas Royalties—The Facts, The Remedies: Hearing Before Subcomm. on Energy and Res. of the H. Comm. on Gov't Reform*, 109th Cong. 26 (Mar. 1, 2006) (statement of Walter Cruickshank, Deputy Dir., Minerals Management Service ("MMS")) ("Cruickshank Statement"). At the time this litigation commenced, Kerr-McGee itself had already invested billions exploring for and producing oil and gas from deepwater areas of the Gulf. Pet. App. 13a.

As Congress intended, this increased production reduced dependence on foreign oil, Cruickshank Statement, *supra*, at 26, and created thousands of jobs, both on-shore and off-shore. As noted during

debate on the RRA, "[d]eepwater incentives, which encourage oil and gas companies to risk their capital on new exploration and production, will create 20,000 new jobs for every $1 billion in private sector investment." 141 Cong. Rec. H11859 (Nov. 8, 1995) (statement of Rep. Brewster). "In turn, these workers pay taxes and create thousands of other indirect jobs." *Outer Continental Shelf Moratorium: Hearing Before the Subcomm. on Energy and Mineral Res. of the H. Comm. on Res.*, 104th Cong. (July 25, 1996) (statement of Cynthia L. Quarterman, Dir., MMS, Dep't of the Interior, at 1).

Increased deepwater investment also brought increased revenue to the Treasury, both in the short and long terms. In the Gulf lease sales held under Section 304, Interior estimated that the United States received $2 billion more in bonus payments than it would have received without royalty relief. Cruickshank Statement, *supra*, at 26; Complaint ¶ 27 (R. 1); Amended Answer ¶ 27 (R. 26). The long-term benefits to the Treasury are also substantial. For the remainder of their terms, Section 304 leases will be fully royalty-bearing after production exceeds the suspension volumes. Moreover, the tracts originally covered by Section 304 leases can be leased again without royalty relief when the original leases expire or are relinquished. These tracts have now become more attractive due to the deepwater infrastructure generated by Section 304 leases. Indeed, Interior has already collected billions of dollars in bonuses for new leases of tracts formerly subject to now-expired Section 304 leases. Interior expects new offshore leases, which will use increased

royalty rates, to yield $170 billion in royalties over 40 years, in addition to billions in upfront bonuses.[1]

B. Interior Intentionally Omits Price Thresholds From Its Regulations For Section 304 Leases.

As Interior expressly stated in the royalty payment order under review in this case, "[t]here are no MMS regulations that address the price thresholds for section 304 leases." Pet. App. 33a. Indeed, among all of the regulations that Interior promulgated to implement the RRA, *only* the Section 304 regulations omit price thresholds. As the regulatory history demonstrates, this was a deliberate choice by Interior.

Carrying out Congress's direction to implement the RRA through regulations, *see* RRA § 305, Interior adopted interim regulations specifically governing Section 304 leases. Those interim regulations did *not* include price thresholds for Section 304 leases and nowhere stated that Interior had the discretion to include them. *See* 61 Fed. Reg. 12022, 12027 (Mar. 25, 1996).

Shortly thereafter, Interior sought public comment on whether, in its final regulations for Section 304 leases, "price ceilings [should] affect suspension volumes in the same ways as for existing leases." 61 Fed. Reg. 6958, 6960 (Feb. 23, 1996). Numerous

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[1] *Royalties at Risk: Hearing Before the H. Comm. on Natural Res.*, 110th Cong. 16 (Mar. 28, 2007) (statement of C. Stephen Allred, Assistant Sec'y, Dep't of Interior); Dep't of the Interior, *OCS Report MMS 2008-013, Deepwater Gulf of Mexico 2008: America's Offshore Energy Future* 20-21 (2008) (two 2007 sales yielded $3.2 billion in bonuses and one 2008 sale yielded $3.7 billion).

commenters responded that the statute forbade Interior from imposing price thresholds on the statutorily-guaranteed royalty relief provided for Section 304 leases. *See* Administrative Record Supplement ("AR Supp.") 8, 22, 46, 62, 94 (R. 33). Interior then promulgated final Section 304 regulations that once again did not include price thresholds or authority to adopt them. *See* 63 Fed. Reg. 2626, 2628-30 (Jan. 16, 1998). To the contrary, the regulations informed lessees that "you do not owe royalty on the production from your lease up to the applicable royalty-suspension volume." 30 C.F.R. § 260.110(d)(6) (1998).[2]

This exclusion was deliberate. As one of its officials has admitted, Interior "*made a policy decision* not to address price thresholds [for Section 304 leases] in the regulations * * *." *Interior Department—A Culture of Management Irresponsibility and Lack of Accountability?: Hearing Before H. Comm. on Gov't Reform*, 109th Cong. 49 (Sept. 14, 2006) (statement of Lynn Scarlett, Deputy Sec'y, Dep't of Interior) ("Scarlett Statement") (emphasis added). While Interior has subsequently contended that it still wanted to be able to include thresholds in individual lease sale documents, *id.*, the actual Section 304 regulations include no such discretion.

In striking contrast, Interior included price thresholds in every other set of royalty suspension regulations adopted pursuant to the RRA. These include (i) the interim and final regulations

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[2] In 2008, Interior removed this provision (then at 30 C.F.R. § 260.117(b)) to conform its regulations to *Santa Fe Snyder Corp. v. Norton*, 385 F.3d 884 (5th Cir. 2004), which had invalidated the regulations on other grounds. *See* 73 Fed. Reg. 58467 (Oct. 7, 2008).

applicable to existing deepwater leases governed by Section 302 (*see* 30 C.F.R. §§ 203.60-91; 61 Fed. Reg. 27263, 27277-78 (May 31, 1996); 63 Fed. Reg. 2605 (Jan. 16, 1998)); (ii) final regulations for "deep gas" wells drilled in shallow water areas of the Gulf (*see* 30 C.F.R. §§ 203.40-48); (iii) regulations for post-2000 leases (*see* 30 C.F.R. §§ 203.78, 260.122); and (iv) regulations implementing Section 303 (*see* 30 C.F.R. § 260.110(g)). Only Interior's regulations governing Section 304 leases fail to include price thresholds or the authority to impose them.

C. Interior Inconsistently Includes Price Thresholds In Section 304 Leases.

The first Section 304 leases, issued in 1996 and 1997, included price thresholds. But shortly after Interior finalized its Section 304 regulations, it began omitting thresholds from Section 304 leases sold at the four lease sales in 1998 and 1999, citing the new regulations that included no price-threshold authority. Pet. 6-7 n.4. Interior has said that this omission was due to "inadvertent" action by "field personnel." *Id.* Regardless of whether the omissions were inadvertent, Interior reinserted price thresholds commencing in 2000 for the final two lease sales governed by Section 304. But its own Solicitor expressed concern that Interior lacked authority to do so. *See* AR Supp. 105 ("Solicitor's Office is concerned with doing so"); *see also id.* at 103 ("The Solicitor does not feel MMS has the clear authority to apply price thresholds").

D. The Decisions Below

Because Interior did not include the unlawful price thresholds in its final Section 304 regulations, Kerr-McGee and other lessees could not have them

judicially invalidated until faced with a final, reviewable order to pay royalties. *See OXY USA Inc.* v. *Babbitt*, 122 F.3d 251, 259 (5th Cir. 1997) (lessee may not challenge MMS royalty payment orders until they are "final" under the Administrative Procedure Act ("APA")). Kerr-McGee eventually received such an order for eight Section 304 leases in which it held an interest. Pet. App. 23a. Kerr-McGee then filed suit under the APA, alleging that the order and the lease terms it sought to enforce were "not in accordance with law," 5 U.S.C. § 706(2)(A), because they require payment of royalties before Kerr-McGee has produced the minimum royalty suspension volumes required by Section 304.

The district court held that Interior had violated Section 304. It relied in part on the reasoning of *Santa Fe Snyder Corp.* v. *Norton*, 385 F.3d 884, 885 (5th Cir. 2004), in which the Fifth Circuit had rejected a similar attempt by Interior to circumvent the minimum royalty suspension volumes established in Section 304. The court held that Section 304 was unambiguous and unequivocal: Interior had no authority to alter the statute's mandatory volume-based royalty relief. Pet. App. 21a.

The court also rejected Interior's argument, asserted in a series of affirmative defenses, that Kerr-McGee was precluded from challenging the price thresholds because it had signed form leases containing the threshold provisions. As the court held, "'if government officials make a contract they are not authorized to make, in violation of a law enacted for the contractor's protection, the contractor is not bound by estoppel, acquiescence, or failure to protest.'" Pet. App. 21a (citation omitted). Thus, Interior was unable to evade review by excluding

clearly unlawful terms from its regulations and instead including them in take-it-or-leave-it standard form leases that could not be negotiated or effectively challenged in advance.

A panel of the Fifth Circuit unanimously affirmed, agreeing that Section 304 unambiguously creates mandatory royalty relief that Interior has no authority to alter. Pet. App. 10a. The Fifth Circuit also expressly noted that Interior had failed to appeal the rejection of its affirmative defenses and "therefore, it has abandoned this argument." Pet. App. 9a n.3. Thus, Interior's argument that Kerr-McGee will receive "unjustified windfalls" because it bid for and signed Section 304 leases, Pet. 23, has been waived.

REASONS FOR DENYING THE PETITION

I. APPLYING SETTLED TOOLS OF STATUTORY CONSTRUCTION, THE FIFTH CIRCUIT CORRECTLY INTERPRETED A NARROW STATUTE OF LIMITED AND DIMINISHING APPLICATION.

A. The Question Presented Applies Only To A Very Small And Dwindling Number Of Leases.

The question presented has an exceedingly narrow reach. This case solely concerns Section 304 of the RRA, which governs only offshore oil and gas leases (1) issued between 1996 and 2000; (2) for a specific region of the Gulf of Mexico; and (3) in water depths of more than 200 meters. *See* RRA § 304. The question is further narrowed to those Section 304 leases entered into in 1996, 1997 and 2000, because Interior omitted the challenged price thresholds from Section 304 leases granted pursuant to lease sales held in 1998 and 1999. The issue thus will not recur

with respect to any offshore tracts leased in the future, nor does it exist for the thousands of offshore federal tracts located in shallow water areas of the Gulf of Mexico, or in shallow and deep water areas of the Eastern Gulf, the Pacific, and offshore Alaska.

The number of leases still covered by Section 304 diminishes every year as leases expire or are surrendered. When leases originally covered by Section 304 expire or are surrendered and are subsequently offered for leasing by Interior, the lands are no longer subject to Section 304, and Interior can grant new leases without royalty suspensions. Unless maintained by timely lease operations, *see* 43 U.S.C. § 1337(b)(2), the 1996 leases expired by 2006, the 1997 leases expired by 2007, and the 2000 leases will expire by next year. AR 73, 127, 158. Despite prudent exploration and development efforts, most Section 304 leases are not producing. Accordingly, out of the 2,369 covered leases issued in 1996, 1997 and 2000, Interior asserts that only eighty-three (or 3.5% of the total) will ever be affected by the interpretation it espoused below. *See* Pet. 22; GAO Report GAO-07-590R at 5 (Apr. 12, 2007) (www.gao.gov/new.items/d07590r.pdf).

B. The Fifth Circuit Correctly Construed Section 304's Unique Language.

It is *undisputed* that Interior's invalidated price thresholds would have the effect of reducing Kerr-McGee's suspension volumes below the minimum volumes that Congress established in Section 304. This is because Interior has demanded royalties in any year when prices exceed the thresholds, with production during such years counting toward the suspension volume on which Congress directed that

royalties not be owed. Pet. App. 2a-3a.[3] The issue is not *whether* the price thresholds would reduce Kerr-McGee's royalty suspension volumes, but whether that reduction is *lawful*.

The unanimous Fifth Circuit panel, like the district court before it, had no difficulty applying settled tools of statutory interpretation to hold that the unique language of Section 304 unambiguously bars Interior's action. As the court held, "[t]he statement that 'the suspension of royalties shall be set at a volume not less than' the specific production levels means just that: royalty payments shall be suspended up to the production volumes established by Congress." Pet. App. 10a. The only other case ever to have considered Section 304, *Santa Fe Snyder*, *supra*, employed very similar reasoning and unanimously affirmed a decision invalidating another attempt by Interior to circumvent the statute's commands. Accordingly, eight federal judges have considered Section 304 and all have agreed that it unambiguously prevents Interior from altering Congress's mandate so as to reduce or eliminate the minimum suspension volumes. Nothing about that routine exercise in statutory construction warrants this Court's review.

1. Section 304 provides that, for the narrow category of leases it covers, Interior "shall use the bidding system authorized in [Section 303], except

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[3] Thus, for example, if a Section 304 lease that is entitled to a minimum statutory royalty suspension equal to 52.5 million barrels of production, *see* RRA § 304(2), produces 2.5 million barrels during a year in which commodity prices exceed the threshold, under the price thresholds royalties would be owed on those 2.5 million barrels and the total maximum royalty suspension volume would be reduced to 50 million barrels.

that the suspension of royalties shall be set at a volume of not less than" statutorily-specified amounts, depending on water depth. RRA § 304. Interior cannot credibly explain how a royalty suspension that Congress specified "shall be set at a volume of *not* less than" a certain amount can be unilaterally reduced by the Secretary below the statutory minimum. Instead, Interior seeks to rewrite the statute, adding terms that Congress did not use and reordering the words that Congress actually employed. Thus, Interior asserts that Section 304 merely specifies volumes "at which royalty suspensions were to be set *in the first instance*," or "at which a royalty suspension is *initially* set." Pet. 13, 16 (emphases added). But Interior's editorial additions are absent from the statute. Section 304's directive uses no such qualifiers: it categorically says that suspensions "shall be set" at certain minimum volumes. Period.

Interior also argues that the "'except' clause of Section 304 limits the Secretary's discretion under the *first* clause of Section 303," but "does not apply to the Secretary's discretion under the *second* clause of Section 303 to 'vary' a suspension based on the price of production." Pet. 12-13 (emphases in original). But that is not how Congress wrote the statute. Within Section 304, Congress placed the "except that" clause so that it follows, and thus directly qualifies, the entirety of the cross-reference to the Section 303 bidding system. Interior's rewriting of the text, reproduced at footnote 8 of the petition, shows why its interpretation is wrong. When it attempts to meld Section 304's "except" clause with Section 303, Interior shoehorns that clause into the middle of Section 303 so that it modifies only part of

that section. *See* Pet. 13-14 n.8. But as Congress wrote the statute, Section 304 modified the *entirety* of the discretion that Section 303 otherwise vested in Interior, not simply the discretion created by the first clause of Section 303.[4]

Interior's argument is further belied by the plain language of Section 303. Interior bases its entire argument on Section 304's cross-reference to Section 303, which states that Interior may award leases "*with suspension of royalties* for a period, volume, or value of production *determined by the Secretary, which suspensions* may vary based on the price of production from the lease." 43 U.S.C. § 1337(a)(1)(H) (emphasis added). Interior argues that its discretion under Section 303 to "vary" suspensions "based on the price of production" was not removed by the "except that" clause of Section 304.

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[4] If the two sections are combined accurately, the result is as follows:

> For all tracts located in water depths of 200 meters or greater [in the specified area of the Gulf], any lease sale within five years of the date of enactment of this title shall use the bidding system authorized in [Section 303]:
>
> > cash bonus bid with royalty at no less than 12 and 1/2 per centum fixed by the Secretary in amount or value of production saved, removed, or sold, and with suspension of royalties for a period, volume, or value of production determined by the Secretary, which suspensions may vary based on the price of production from the lease,
>
> except that the suspension of royalties shall be set at a volume of not less than the following: (1) 17.5 million barrels of oil equivalent for leases in water depths of 200 to 400 meters; (2) 52.5 million barrels of oil equivalent for leases in water depths of 400 to 800 meters; (3) 87.5 million barrels of oil equivalent for leases in water depths greater than 800 meters.

But under the plain language of Section 303, the only suspensions that "may vary" are suspensions that have been "determined by *the Secretary*." For Section 304 leases, however, the suspensions were determined not by *the Secretary* in his discretion, but rather by *Congress* as a statutory mandate. *See* Pet. App. 10a ("§ 304 'immediately excepts and replaces Interior's discretion'") (quoting *Santa Fe Snyder*, 385 F.3d at 892). As Interior itself has conceded, Section 304 "removes Interior's discretionary authority provided by section 303 to 'determine' the 'period, volume, or value of production' at which royalties will be suspended by expressly specifying the 'volume' at which the suspension of royalties 'shall be set.'" Interior 5th Cir. Br. 16-17 (filed June 27, 2008). Because the "which suspensions" language in Section 303 unambiguously refers solely to suspensions "determined by the Secretary," that language confirms that Interior has no authority to "vary" the Section 304 suspensions, which were determined by Congress.

The Fifth Circuit was therefore correct in holding that "Interior's reading would render § 304's mandatory language meaningless[,]" because "if price thresholds trigger royalty payments before § 304's production volumes are exceeded, then the royalty payment suspension *is* being set at a volume less than § 304's specified production levels." Pet. App. 9a (emphasis in original). Indeed, if Interior's interpretation were correct, it could have relied on the "which suspensions may vary" language of Section 303 to set price thresholds so low that they would always be exceeded, thus entirely negating Congress's mandated suspensions. If Interior has

the discretion it claims, there would have been no need for Congress to have enacted Section 304 at all.

Interior identifies no precedent of this Court that the Fifth Circuit allegedly failed to follow. It cites *Commissioner* v. *Clark*, 489 U.S. 726, 739 (1989), for the proposition that "statutory exceptions are to be construed narrowly," Pet. 13, but the Fifth Circuit merely gave Section 304 its natural, narrow reading. Even narrowly construed the term "the suspension of royalties shall be set at a volume of *not less than* * * * 52.5 million barrels of oil equivalent," RRA § 304(2) (emphasis added), does not allow Interior to reduce royalty suspensions to volumes *less than* 52.5 million barrels of oil equivalent.

2. Lacking textual support in Section 304, the statute that actually governs this case, Interior devotes much of its argument to construing Section 302, a provision that does not apply to the leases at issue in this case and that serves different purposes. As the Fifth Circuit correctly observed, far from supporting Interior's statutory interpretation, the comparison between Sections 302 and 304 only shows why that interpretation is wrong.

In keeping with Section 302's requirement that existing deepwater leases would only receive royalty suspensions based on a demonstration of economic need, Congress expressly conditioned royalty suspensions for such leases on price thresholds. *See* 43 U.S.C. § 1337(a)(3)(C)(v)-(vi). These economic strings on royalty suspensions, however, are conspicuously missing from Section 304. Thus, as the Fifth Circuit correctly explained, "[h]ad Congress intended to impose price thresholds on the royalty relief for [Section 304] leases, it certainly knew how to do so." Pet. App. 10a. Far from raising an important legal

issue worthy of this Court's review, this determination was dictated by well-settled precedent. *See, e.g.*, *Allison Engine Co.* v. *United States ex rel. Sanders*, 128 S. Ct. 2123, 2129-30 (2008) ("'[W]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'") (quoting *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) (alteration in original)).

The difference in language chosen by Congress reflects the fact that Sections 302 and 304 served different purposes. Because the owners of *existing* deepwater leases had already determined that it was worth investing to some extent, Congress ensured that incentives for further investing in these leases would be less than for new leases and that the royalty suspensions for existing leases would be more limited. Thus, for *existing leases*, the statutory right to royalty suspensions is highly conditional: conditioned on the profitability of the lessee's operations, conditioned on there being "new production," and conditioned on commodity prices remaining below the statutory price thresholds.

By contrast, for leases not yet granted and governed by Section 304, Congress mandated royalty suspension incentives *without* any showing of economic hardship, in order better to attract the many billions of dollars in new investment that were essential to generating new, large-scale deepwater exploration. These differences were apparent to Interior's own economists, who noted only two years into the five-year Section 304 time period that, "[c]learly, the *mandated royalty suspensions*

available to new fields, *regardless of economic need*, played an important role" in causing "bidding on deep water tracts [to] explode." Complaint ¶ 24 (R. 1) (emphasis added); Amended Answer ¶ 24 (R. 26).

Interior's attempt to conflate Sections 302 and 304 is thus directly contrary to Congress's intentional omission of conditions in Section 304 that it mandated in Section 302.

3. Although the Fifth Circuit found it unnecessary to consult legislative history, that history further shows why Interior's position is wrong.

Congress *rejected* a proposal to amend Section 304 to provide Interior with exactly the authority it has now arrogated to itself. As an opponent of the RRA noted in urging its defeat,

> [u]nder the language of the conference report, all leases in more than 200 meters *must* be granted on a royalty-free basis for the next 5 years *with no finding of need* * * *. *Don't let anyone tell you the royalty holiday is discretionary for new leases. My amendment, offered in the conference, to make it clear the holiday is discretionary was voted down. So there should be no doubt: this holiday is mandatory, regardless of need, regardless of facts, regardless of cost.*

141 Cong. Rec. H11875-76 (Nov. 8, 1995) (emphases added) (statement of Rep. Miller). *See also id.* at H11857 (Nov. 8, 1995) ("The problem with this is, it is mandatory."); *id.* at H11868 (Nov. 8, 1995) ("This is an entitlement for the next five years because this is mandatory. This is not discretionary."); *id.* at H7580 (July 25, 1995) (legislation "mandates that * * * on future leases—for 5 years—there be no

finding of hardship; royalties must be forgiven at the prescribed level * * *.") (statements of Rep. Miller).

Thus, as another opponent noted, royalty suspensions under Section 304 are automatic and non-discretionary *even if commodity prices rise*:

> [t]here is no opportunity for flexibility or judgment, this Senate language mandates the application of this new policy [of royalty relief]. *What happens if the price of oil changes?* That happens just about every day. If the price goes up, obviously these leases and the recovery of this oil becomes even more economically feasible than today. *If this legislation were put in law, it is a policy. The money flows out no matter what.*

Id. at H7584 (July 25, 1995) (statement of Rep. Vento) (emphases added).

As a principal sponsor agreed, Section 304 is "straightforward. For the next 5 years, deep water leases will be offered for sale under the following terms: First, payment of an upfront bonus bid, and second, waiver of the royalty on a fixed volume of oil and gas based on the water depth of the lease." 141 Cong. Rec. S17023 (Nov. 14, 1995) (statement of Sen. Johnston). Price thresholds, expressly included in Section 302, are not among those terms, while the royalty suspension volume was "fixed." *Id.*

The Fifth Circuit's interpretation therefore hews exactly to Congress's intent and evokes no need for this Court's extraordinary intervention.[5] That dec-

[5] *See, e.g., Sec'y of the Interior* v. *California*, 464 U.S. 312, 327 (1984) ("Since House § 313 would have provided respondents with precisely the protection they now seek here, it is significant that the Conference Committee, and ultimately the Congress as a whole, flatly rejected the provision."); *Thompson* v. *Thompson*, 484 U.S. 174, 183-85 (1988) (exchange

ision did not result in any unwarranted "windfalls," Pet. 18, 23, but rather carried out Congress's precise intent: non-discretionary royalty relief for certain leases over a limited five-year period, which Congress accurately predicted would result in billions of dollars in additional upfront bonuses, new investment, new jobs, and higher royalties on future leasing. The term "windfall" suggests a hand-out or benefit that is received unexpectedly. Given that Congress intended to jump-start the ailing offshore oil and gas industry with the RRA, the Fifth Circuit's decision results in no windfall.

C. Interior's Misinterpretation Warrants No Deference.

The petition also asserts that Interior's interpretation is owed *Chevron* deference. *See* Pet. 11-12. The Fifth Circuit correctly found it unnecessary to reach this issue because the statute is unambiguous, but Interior's invocation of *Chevron* is in any event wrong. Although the petition implies otherwise, Interior's current interpretation of Section 304 appears in no notice-and-comment regulations or any other formal determination worthy of deference. Quite to the contrary, Interior made the considered decision *not* to incorporate price-threshold authority into its Section 304 regulations.

Chevron deference "is warranted only 'when it appears that Congress delegated authority to the agency generally to make rules carrying the force of

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in committee hearing showing "Congress considered and rejected an approach to the problem" provided an "unusually clear indication that Congress did not intend" that approach); *Smith* v. *United States*, 507 U.S. 197, 202 n.4 (1993) (rejecting interpretation that "would effectively resurrect the scheme rejected by Congress").

law, *and that the agency interpretation claiming deference was promulgated in the exercise of that authority.*'" *Gonzales* v. *Oregon*, 546 U.S. 243, 255-56 (2006) (quoting *United States* v. *Mead Corp.*, 533 U.S. 218, 226-27 (2001)) (emphasis added). Such deference is unwarranted for informally-reached determinations such as those contained in "opinion letters * * *, policy statements, agency manuals, and enforcement guidelines." *Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000).

Congress directed Interior to implement both the OCSLA and the RRA through formal notice-and-comment regulations. *See* 43 U.S.C. 1334(a); RRA § 305; Pet. 11 n.7. But the only regulations for which the petition asserts deference are those governing *Section 303* of the RRA. *See* Pet. 12 (noting that "the Department implemented *Section 303*" by acknowledging price-threshold authority) (citing 30 C.F.R. § 260.110(a)(7) (1998)) (emphasis added). It is undisputed that Interior can vary suspensions by price in leases that are governed only by Section 303 and not subject to the specific mandate of Section 304. Thus, the inclusion of price-threshold authority in the general Section 303 regulations says absolutely nothing about whether such authority is appropriate in light of the specific language of Section 304. Indeed, Interior included express price thresholds in its specific regulations governing other leases subject to the general Section 303 bidding system, *see* 30 C.F.R. § 203.48 (royalty relief for "deep gas" wells drilled in shallow water); *id.* § 260.122 (post-2000 leases), but deliberately excluded that authority from its Section 304 regulations.

If any decision is worthy of *Chevron* deference in this case, it is Interior's considered policy decision

not to include price-threshold authority in its Section 304 regulations. As Interior admitted in the order under review, but now neglects to inform this Court, "[t]here are no MMS regulations that address the price thresholds for section 304 leases." Pet. App. 33a. In formulating its regulations, Interior had specifically solicited comment as to whether, for Section 304 leases, "price ceilings [should] affect suspension volumes in the same ways as for existing leases," 61 Fed. Reg. at 6960, and was informed by several commenters that Section 304 prohibited such thresholds, AR Supp. 8, 22, 46, 62, 94. It then issued final Section 304 regulations *without* price-threshold authority, and affirmatively informed lessees that "you do not owe royalty on the production from your lease up to the applicable royalty-suspension volume." 30 C.F.R. § 260.110(d)(6) (1998). As admitted by one of its officials, Interior "made a policy decision not to address price thresholds [for Section 304 leases] in the regulations * * *." Scarlett Statement, *supra*, at 49. This purposeful policy decision *not* to include price-threshold authority in the Section 304 regulations is the only decision that could conceivably warrant *Chevron* deference in this case.

The petition also notes that certain Section 304 leases, contrary to the regulations, include price thresholds. Pet. 12. But that action warrants no *Chevron* deference because the leases were not an exercise of the rulemaking authority directed by Congress. *Gonzales*, 546 U.S. at 255. In any event, the leases contain no discussion of Interior's purported statutory authority, and the agency inconsistently omitted price thresholds from more than a thousand Section 304 leases, expressly citing the governing regulations that contained no such

authority. *See* Pet. 7 n.4. In *Coeur Alaska, Inc.* v. *Southeastern Alaska Conservation Council*, 129 S. Ct. 2458, 2473 (2009), this Court recently declined to accord *Chevron* deference to an agency determination that addressed an issue in detail and was consistent with decades of agency practice, because it was "not subject to sufficiently formal procedures to merit *Chevron* deference." Interior's non-regulatory leasewriting process is even less worthy of deference, since there is no discussion of the purported statutory authority and the leases were inconsistently drafted by lower level employees. Indeed, the mere fact that Interior omitted thresholds from numerous leases through what it now says was "inadverten[ce]" on the part of "field personnel," Pet. 6-7 n.4, shows how casual and *ad hoc* that process really was.[6]

In sum, this case implicates no issue of *Chevron* deference, much less an important one worthy of this Court's review.

II. THIS CASE INVOLVES NO IMPORTANT QUESTION OF LAW.

Interior expressly admits that "there is no conflict in the circuits about the correct interpretation of Section 304 of the Royalty Relief Act," Pet. 18, and it does not argue that the Fifth Circuit disregarded any precedent of this Court. Nor is there any "important question of federal law" that warrants this Court's review. Sup. Ct. R. 10(c). This case involves the

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[6] The petition does not assert *Chevron* deference for the order that directed Kerr-McGee to pay royalties. And for good reason. That determination, which contains no substantive discussion of the interpretive issues, was not the product of any impartial or adversarial adjudication and is simply a demand by Interior for payment.

routine interpretation of a statute that affects at most, by Interior's estimation, eighty-three leases held by a handful of lessees, out of tens of thousands of offshore leases governed by the OCSLA. At bottom, the petition asks the Court to correct "the misapplication of a properly stated rule of law." Sup. Ct. R. 10. No such error occurred. But regardless, nothing in the Fifth Circuit's cogent and well-reasoned decision calls for an exercise of the Court's sparingly used powers of error correction.

Interior nevertheless asserts that the issue is important based solely on its own speculative assertions about the amount of royalties it might have collected under its unlawful price thresholds. But the amount of money a party unlawfully has demanded or says it will demand does not make a case suitable for this Court's review. Indeed, until now that has been the consistent view of Solicitors General, who have advocated denial of petitions where private parties have unsuccessfully sought large amounts from the Government but no credible circuit split was alleged. As the Solicitor General noted in one case, "the mere monetary size" of a petitioner's liability "does not entitle it to further review in the absence of a legal issue of sufficient general significance to warrant this Court's attention." Pet. Opp. 16 n.14, *Exxon Corp.* v. *United States*, No. 85-429 (filed Dec. 28, 1985).[7] That the

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[7] *See also* Pet. Opp., *McDonnell Douglas Corp.* v. *United States*, No. 99-1258 (successfully advocating denial of certiorari after reversal of $1.2 billion judgment against United States) (Jan. 27, 2000); Pet. Opp. 27, *Cal. Fed. Bank, FSB* v. *United States*, No. 04-1557 (successfully advocating denial and noting that even though the cases involved billions of dollars in claims and over a billion dollars in judgments, the Court should not

shoe is now on the other foot is no reason for a different outcome.

The magnitude of Interior's purported "loss" is entirely due to its own setting of price thresholds that were held invalid. If Interior had elected to set lower thresholds, then the purported loss would likely have been even higher, but the case would have been no more suitable for this Court's review. By analogy, a patentee could not secure this Court's review of a case-specific Federal Circuit decision invalidating a patent merely by saying that it could have assessed many billions in royalties under the patent over many years and complaining that no circuit split could develop. That this case involves leases makes it no more worthy of certiorari.

Interior cites no precedent where this Court granted certiorari based merely on the amount alleged to be at stake, in the absence of a circuit split or other issue of importance. Instead, it cites only a case where certiorari was *denied* and language from a treatise. Pet. 21. The "'variety of considerations [that] underlie denials of the writ,' counsels against according denials of certiorari any precedential value." *Teague* v. *Lane*, 489 U.S. 288, 296 (1989) (citation omitted; alteration in original).[8] And the precedential value is even lower for a treatise written largely by practitioners.

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step in where an issue "affects a progressively smaller and steadily dwindling number of cases") (May 19, 2005).

[8] The petition in the cited case, moreover, did not merely rely on the monetary impact but also argued that the lower court decision conflicted with a precedent of this Court and the issue had been decided differently in another circuit. *See* Pet. for Cert., *Fidelity Fed. Bank & Trust* v. *Kehoe*, No. 05-919 (Jan. 17, 2006).

In any event, the Court should not grant review based solely on one party's unsupported speculation of a purported financial impact. Such assertions demand record evidence, which is wholly absent here. Interior's extra-record reports reveal little about the key assumptions on which its speculation necessarily depends: projections of oil and gas production volumes and commodity prices decades into the future, and assumptions about future conduct by Interior and lessees not parties to this action. Despite all these significant uncertainties, Interior boldly projects a narrow range for future foregone royalties in which the high and low ends are remarkably only 5% apart. *See* Pet. 22. Interior's purported losses are as conjectural as its certainty is implausible [9]

Even more important, Interior entirely ignores the many offsetting benefits that were Congress's express basis for enacting the RRA. These include billions in higher upfront bonuses on all leases, including bonuses paid to drill hundred-million-dollar dry holes that will never produce. The benefits also include incalculable billions in new investment, job creation, and other economic development spurred by new exploration in the previously moribund deepwater Gulf of Mexico. And the federal Treasury will directly benefit from

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[9] Just as oil and gas prices have fluctuated wildly in the past, going under the thresholds for significant periods, so too may they in the future. For example, for the first seven months of 2009, the price of natural gas was *below* the threshold. Dep't of the Interior, MMS, *Prices Above Which Full Royalties Are Due Notwithstanding Any Remaining Royalty Suspension Volumes* (www.mms.gov/econ/PDFs/CurrentPT.pdf) (last visited August 27, 2009). If that trend continues over the entire year, no royalties will be due on gas produced from Section 304 leases even under Interior's rejected position.

billions more in higher royalties on future leases in the Gulf, which build upon the new infrastructure spurred by the RRA. Congress knew, of course, that royalty relief would mean relief from royalties. *Cf.* 141 Cong. Rec. H7583 (July 25, 1995) (opponents' estimate of $15 billion impact). But it also expected an offsetting trade-off in terms of higher upfront bonuses and long-term benefits, all of which have been realized.

Finally, Interior's conduct over the years belies its current assertion of importance: its intentional decision to exclude price threshold authority from the Section 304 regulations; its "inadvertent" omission of price thresholds from leases granted at four of the ten lease sales governed by Section 304; and its acquiescence in the *Santa Fe Snyder* decision interpreting Section 304, notwithstanding what Interior estimated were similar multi-billion-dollar impacts. *See* AR Supp. 109 (notice of acquiescence); 72 Fed. Reg. 72652, 72654 (Dec. 21, 2007) (estimating undiscounted foregone revenues of up to $10 billion). Given Interior's own casual and inconsistent approach, there is no basis for this Court to defer to the agency's new-found urgency in order to exercise extraordinary error-correction powers on a routine issue of statutory interpretation.

III. FURTHER REVIEW OF THE ISSUE IS AVAILABLE IN THE LOWER COURTS.

Interior asserts that the Court should ignore the lack of a circuit split because it is "unlikely" one would occur. Pet. 19. Interior admits that there is at least one "plausible route to another court of appeals," Pet. 19, but says it will not pursue that route and instead will voluntarily acquiesce in the Fifth Circuit's decision by refunding royalties

already collected if certiorari is denied. Pet. 20. But Interior neglects to mention another direct avenue for review outside the Fifth Circuit, which would allow it to assert a claim to *all* other royalties allegedly owed. And in any event, a party cannot manufacture grounds for certiorari by unilaterally cutting off other available avenues for review.

Interior notes one avenue for extra-circuit review. Interior has already collected what it says are $1.5 billion in royalties as a result of price thresholds in Section 304 leases. *See* Pet. 22. Lessees seeking to recover those amounts would have to seek refunds in the Court of Federal Claims, with review available in the Federal Circuit. *See Amoco Prod. Co.* v. *Hodel*, 815 F.2d 352, 368 (5th Cir. 1987) (jurisdiction over royalty refund suits lies exclusively in Court of Federal Claims for claims over $10,000).[10] It would then be open to the Federal Circuit to decide whether to follow the Fifth Circuit's decision.[11]

Moreover, there is another, far more direct, avenue by which the government can seek review of the statutory issue outside the Fifth Circuit. Under 30 U.S.C. § 1722(a), the government, "[i]n addition to any other remedy," may "bring a civil action in a district court * * * to compel the taking of any action

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[10] Some lessees might seek to offset those overpaid royalties against other amounts, but only if they have other producing leases for which royalties are owed and are able to comply with time limits and other legal requirements.

[11] If the government obtains a favorable decision in the Federal Circuit, it could acquiesce in this Court's review. Or, in the very unlikely event all affected lessees elect to forego the entire $1.5 billion by not appealing an adverse decision, Interior could then swiftly take another case to this Court through the Fifth Circuit after issuing an order to pay.

required by or under * * * any mineral leasing law of the United States." Such suits may be brought anywhere "the defendant is found or transacts business." 30 U.S.C. § 1722(b). This provision allows the government to file an affirmative suit to recover royalties alleged to be owed, even before it issues a formal order to pay.[12] Such suits can be brought anywhere a lessee transacts business, which would include most (if not all) circuits for the large energy companies that entered into Section 304 leases. The government has traditionally elected not to employ this remedy, preferring instead to issue administrative orders to pay that are subject to APA review proceedings initiated by the federal lessee. Nevertheless, Section 1722(a) suits remain a potential avenue for the government to continue to assert claims to Section 304 royalties, whether past or future, notwithstanding the Fifth Circuit's decision.[13]

Without even mentioning the possibility of such actions, Interior says that review in the Court of Federal Claims will never occur because "if the Fifth Circuit's decision is allowed to stand, the Department does not intend under the circumstances to oppose refunds of royalties" that do not comport

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[12] *See Samedan Oil Corp.* v. *Deer*, No. 94-2123, 1995 U.S. Dist. LEXIS 10158, at *26-27 (D.D.C. June 14, 1995) ("Although a lessee may have to exhaust administrative remedies prior to suing, nothing in the statute or regulations or lease contract foreclose[s] a lawsuit by the United States as soon as the royalties [are] overdue. Nothing prevented the government from bringing a civil action, either under * * * 30 U.S.C. 1722(a) or under common law for breach of the lease contract."); *see also BP Am. Prod. Co.* v. *Burton*, 549 U.S. 84, 88 (2006) (government may enforce order to pay under Section 1722(a)).

[13] Relitigation of the issue against Kerr-McGee or its privies, however, would be precluded by estoppel and other principles.

with that decision. Pet. 20. If Interior wants voluntarily to refund what it says is $1.5 billion and counting—or refuse to institute actions to collect what it speculates may be many billions more—rather than test its theory in another circuit, that is its choice to make. But this Court's certiorari decisions should not be governed by whether the government unilaterally seeks to avoid another potentially adverse circuit court decision.

The only reason a circuit split may be unlikely is because other circuits will agree with the Fifth Circuit, or Interior will decide not even to give them the opportunity. Either way, that is not a reason for this Court to grant certiorari on a narrow issue over which there is admittedly no conflict and that is subject to further review in other circuits.

CONCLUSION

For these reasons, the petition should be denied.

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No. 09-54

In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL., PETITIONERS

v.

KERR-MCGEE OIL AND GAS CORP.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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72 Fed. Reg. 72,654 (2007) 11
141 Cong. Rec. (daily ed. Nov. 8, 1995):
p. H11,857 5
p. H11,875 ..... 5, 6
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Office of the Inspector Gen., U.S. Dep't of the Interior, *Investigative Report on the Lack of Price Thresholds in Gulf of Mexico Oil and Gas Leases* (2007) <http://www.doioig.gov/upload/MMS%20ROI%20REDACTED.pdf> 4

In the Supreme Court of the United States

No. 09-54

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL., PETITIONERS

v.

KERR-MCGEE OIL AND GAS CORP.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

Respondent's leases expressly require it to pay the United States royalties on federal oil and gas that it produces in years when the price of oil or gas exceeds certain thresholds specified in the leases. See Pet. 5-8. The court of appeals invalidated those price thresholds—and thus relieved respondent of its royalty obligations—on the basis of an erroneous construction of Section 304 of the Outer Continental Shelf Deep Water Royalty Relief Act (RRA), Pub. L. No. 104-58, Tit. III, 109 Stat. 565. If allowed to stand, that decision will cost American taxpayers hundreds of millions of dollars on respondent's leases alone, and probably at least $19 billion under all similar leases. See Pet. 21-23. Review by this Court therefore is warranted.

A. The Interior Department's Interpretation Of Section 304 Of The RRA Is Reasonable And Entitled To Deference

1. a. As the petition explains (at 5-6, 11-13 & n.8), the Interior Department has consistently read Section 304 of the RRA as establishing minimum volumes at which royalty suspensions "shall be set" in leases issued in the five years after November 28, 1995, but also allowing—by virtue of its cross-reference to Section 303 (43 U.S.C. 1337(a)(1)(H))—such suspensions to "vary" on the basis of changes in the market price of oil or gas. Respondent simply ignores the RRA's pattern of treating initial suspensions of royalties as distinct from the power to vary those suspensions based on prices at the time of production. See Pet. 16-17.

Respondent contends that Section 304 does not allow variances because the "plain language of Section 303" allows suspensions to "vary" only if those suspensions have been "determined by the Secretary" as a matter of discretion. Br. in Opp. 19. That is incorrect. Section 304 removes the discretion the Secretary would otherwise have under the first clause of Section 303 to determine the basis on which any suspension may be set (*i.e.*, a "period, volume, or value of production") and instead specifies that "the suspension of royalties shall be set" by the Secretary at amounts not less than specified volumes. But the Secretary continues to have discretion to set the suspensions at the minimum volumes or at some greater amounts; that the Secretary chose to set suspensions at the minimums does not mean the Secretary did not "determine[]" them. Moreover, the limited "except[ion]" to Section 304's incorporation of Section 303 leaves unaffected the Secretary's distinct authority in the second clause of Section 303 to "vary" a suspension —irrespective of the manner in which it was initially

set—"based on the price of production from the lease." See Pet. 13 & n.8.

b. Although respondent describes Congress's desire to encourage new development in deep-water areas of the Gulf of Mexico (Br. in Opp. 8-9), it never refutes the petition's explanation (Pet. 17-18) that the incentives created by a royalty suspension are unnecessary when the price of oil or gas reaches a high enough level to compensate for the costs of new production. Indeed, if price thresholds vitiated those incentives, then the Department's practice of including them in the vast majority of leases issued after the RRA would have squelched the explosion of "[d]eepwater leasing activity * * * immediately after the RRA was passed." Br. in Opp. 8.

2. Respondent suggests (Br. in Opp. 10-12, 25-27) that the Department has been inconsistent about its statutory authority to include price thresholds in leases covered by Section 304, principally because it did not include price thresholds in the text of regulations issued in 1998 to implement Section 304.

Respondent, however, points to no evidence that the Department ever concluded it lacked such authority. To the contrary, its interim rulemaking stated that the new Section 303 bidding system—which included any price thresholds "specified in the notice of sale published in the *Federal Register*"—would apply to "[a]ny lease sale held before November 28, 2000." 61 Fed. Reg. 3801, 3805 (1996). When it adopted later regulations, the Department decided to continue the practice of addressing price thresholds in notices of sale, to give the Department flexibility to respond to market conditions at the time of individual sales. See *Interior Department: A Culture of Management Irresponsibility and Lack of Accountability?: Hearing Before the House Comm. on*

Government Reform, 109th Cong., 2d Sess. Pt. 2, at 49, 67, 72 (2006) (*House Hearing*).

Respondent relies (Br. in Opp. 10-11) on statements by some commenters in the rulemaking, who asserted that the Department lacked authority to include price thresholds under Section 304. But other commenters—including Shell and BP—agreed with the continued application of price thresholds to leases under Section 304. See Admin. R. Supp. 85 (A.R. Supp.) ("The approach should be consistent across all leases. This question is adequately dealt with by MMS in the Notice of Sale for Sale 157 [in 1996]."); *id.* at 35. The Department agreed that it had authority to impose price thresholds, as evidenced by its express inclusion of such thresholds in the Section 304 leases issued in 1996, 1997, and 2000.

Moreover, the Department's inadvertent failure to include price thresholds in leases issued in 1998 and 1999 was universally regarded—within the agency and by its congressional overseers—as an error that was inconsistent with the Department's policy decision to include price thresholds. See Office of the Inspector Gen., U.S. Dep't of the Interior, *Investigative Report on the Lack of Price Thresholds in Gulf of Mexico Oil and Gas Leases* 3, 5-6 (2007) <http://www.doioig.gov/upload/MMS%20ROI%20REDACTED.pdf>; *House Hearing* 5 (remarks of Rep. Waxman) ("I think we all recognize" that "the omission of price thresholds for royalty relief in oil and gas drilling leases signed in 1998 and 1999" was "a huge and unacceptable mistake.").

Respondent erroneously suggests (Br. in Opp. 26) that the payment order in this case said there is no basis in the regulations for price thresholds. The sentence respondent quotes was about how to calculate the date on which royalties must be paid when price thresholds

are exceeded. Pet. App. 33a. The order elsewhere made clear that the power to impose price thresholds under Section 304 "derive[s] from specific authority granted in [Section 303]." *Id.* at 28a.[1]

3. Respondent attempts to support its reading of the RRA by quoting (Br. in Opp. 22-23) floor statements of Members of Congress who opposed the bill. In doing so, it proves the well-established principle that "[t]he fears and doubts of the opposition are no authoritative guide to the construction of legislation." *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 394 (1951). There is no text of the amendment that Representative Miller purportedly "offered in the conference" in an attempt to render the royalty suspension "discretionary," 141 Cong. Rec. H11,875 (daily ed. Nov. 8, 1995), and there is no explanation for why that amendment was rejected. It is thus impossible to say, as respondent does, that Congress purposely rejected the Department's reading of the statute. Moreover, Representative Miller's statements contain many indications that he was concerned about making the initial *suspension* of royalties under Section 304 "mandatory" and "regardless of need." *Id.* at H11,875-H11,876; see *id.* at H11,857. He was refuting a statement that royalty relief "would only be granted on tracts where the Secretary

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[1] Respondent says (Br. in Opp. 12) the Office of the Solicitor of the Interior "expressed concern" about the Department's authority to include price thresholds. One of the quoted references merely expressed uncertainty about the authority to impose price thresholds retroactively with respect to a lease issued in 1998 without a price-threshold term. A.R. Supp. 103. The other reference (*id.* at 105) is from 2000 but is cryptic and does not purport to be a final opinion. Nevertheless, respondent's view indisputably did not carry the day, since price thresholds were included in later-issued leases.

determines it is necessary to encourage development." *Id.* at H11,875. Thus, he was contrasting Section 304 with the provisions governing pre-existing leases, under which suspensions could be triggered only upon the Secretary's determination that "new production would not be economic in the absence of [royalty] relief." 43 U.S.C. 1337(a)(3)(C)(ii). But in the case of pre-existing leases, the economic-need determination was separated from the statutory provisions imposing price thresholds. 43 U.S.C. 1337(a)(3)(C)(v) and (vi). And Representative Miller gave no indication he was addressing price thresholds, as opposed to the lack of an economic-need determination, in Section 304.

Murky floor statements from legislative opponents are less informative than the oversight hearing respondent also cites. Br. in Opp. 11, 26. Of the many Representatives who spoke at that hearing, none suggested the agency lacked authority to include price thresholds between 1996 and 2000. See *House Hearing* 1-2, 5-6, 16-17, 29, 30, 31, 31-32, 35-36, 39-40 (remarks of Reps. Davis, Waxman, Maloney, Kucinich, Duncan, Watson, Issa, Cummings, Markey). If it had lacked such authority, there would have been little point in holding a fifth hearing (*id.* at 5) to investigate and chastise the Department for failing to include thresholds in 1998 and 1999.

4. That widespread understanding that the Department had authority to impose price thresholds shows that its reading of the RRA was, at the very least, a reasonable one. But respondent claims that the Department's interpretation is not entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), because price-threshold authority was not incorporated "into its Section 304 regulations." Br. in Opp. 24. In fact, this Court has long recognized that official agency

interpretations adopted through a "relatively formal administrative procedure tending to foster * * * fairness and deliberation" are entitled to *Chevron* deference. *United States* v. *Mead Corp.*, 533 U.S. 218, 230 (2001); see *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 171 (2007) (deferring to interpretation of regulations contained in an "Advisory Memorandum" because it "reflect[ed the agency's] considered views"); *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 477-482 (2001) (applying *Chevron* to statements in explanatory preamble to final regulations). In this case, the official position that the agency has repeatedly expressed—in the preamble to the Section 303 regulations, in multiple notices of lease sales, in the terms of the leases themselves, in the order to pay, and in this litigation—is entitled to deference. Moreover, there is every reason to believe that Congress expected the Department to speak with the "force of law" (*Mead*, 533 U.S. at 229) when it drafted the terms of the lease and issued its order to pay, since Congress authorized administrative penalties of $10,000 a day for failure to comply with either. See 30 U.S.C. 1719(c)(1).

B. There Remains No Meaningful Opportunity For Further Percolation In The Courts Of Appeals

The petition explains (at 18-21) that there will be no meaningful opportunity for further interpretation of Section 304 of the RRA by the courts of appeals because future suits (like this one) under the Administrative Procedure Act, 5 U.S.C. 706(2), would be filed in the Fifth Circuit, and because a conflict with the Federal Circuit would be very unlikely to occur. Respondent does not dispute the first proposition. And respondent actually gives an additional reason why refund suits that could be

appealed to the Federal Circuit are unlikely: lessees with other producing leases could simply offset their putative refunds against other royalties they owe, rather than sue in the Court of Federal Claims. Br. in Opp. 32 n.10; see 30 U.S.C. 1721a(a).

Respondent separately contends that a civil enforcement action under 30 U.S.C. 1722(a) could provide another avenue for the government to "seek review of the statutory issue outside the Fifth Circuit." Br. in Opp. 32-33. But, as respondent acknowledges (*id.* at 33), the government has not previously attempted to short-circuit the administrative process for determining royalty obligations by filing suit under that provision. Indeed, although respondent cites a reference to Section 1722(a) in *BP America Production Co.* v. *Burton*, 549 U.S. 84, 88 (2006), the Court's opinion there assumed that such a suit would come after the Department had followed its usual process of notifying the lessee about a deficiency in royalty payments, then "reviewing the lessee's response," and, if it still "concludes that the lessee owes additional royalties," only then "[issuing] an order requiring payment of the amount due," which could be enforced under Section 1722(a). *Ibid.* As the government informed the Court in that case (Br. at 37-38), the Department "is not aware of any instance in which recourse to the courts was necessary to require compliance with an order to pay. Instead, MMS administratively imposes civil penalties to enforce its orders." Such orders are, of course, susceptible to administrative challenges by lessees—who would naturally seek out the Fifth Circuit.[2] This Court's exercise of certiorari juris-

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[2] As the petition notes (at 22), there are already 21 other pending administrative appeals of orders to pay royalties under Section 304

diction should not turn on whether a federal agency is willing to upend its well-established administrative practices in favor of a novel enforcement mechanism solely to shop for a forum other than the one where the leased properties are located.

C. The Issue In This Case Involves Tens Of Billions Of Dollars Of Federal Revenue

Explaining that the court of appeals' decision can be expected to cost the Treasury at least $19 billion (Pet. 21-23), the petition notes Justice Scalia's recent observation that "enormous potential liability, which turns on a question of federal statutory interpretation, is a strong factor in deciding to grant certiorari." *Fidelity Fed. Bank & Trust* v. *Kehoe*, 547 U.S. 1051, 1051 (2006) (Scalia, J., joined by Alito, J., concurring in the denial of certiorari). In an odd attempt to refute that view, respondent invokes (Br. in Opp. 29) the Court's refusal in *Teague* v. *Lane*, 489 U.S. 288 (1989), to treat "opinions accompanying the denial of certiorari" as if they have "the same effect as decisions *on the merits*." *Id.* at 296 (emphasis added). But the petition suggested no such treatment; it simply posited the view, expressed also in the leading treatise, that enormous monetary stakes count as a significant reason to grant certiorari.[3]

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leases. Respondent provides no reason to conclude that those suits will not proceed to the Fifth Circuit and result in the same sort of preclusion it asserts for itself. See Br. in Opp. 33 n.13; see also *Marathon Oil Co.* v. *Babbitt*, 938 F. Supp. 575, 581 n.12 (D. Alaska 1996) (concluding that a suit under Section 1722(a) to collect unpaid royalties would need to be stayed while the lessee pursued administrative challenges).

[3] Respondent also relies (Br. in Opp. 28-29 & n.7) on the government's previous opposition to certiorari in cases involving large amounts of money. The cases it cites, however, had other vehicle prob-

Respondent attempts, by raising a series of non sequiturs, to minimize the very large amounts of money that the United States would be unable to collect if the decision below were allowed to stand. First, respondent objects that the government's predictions are not supported by "record evidence" (Br. in Opp. 30), but the record in this case is inevitably about the administrative decision under review—not the broader effect the appellate ruling will have.

Second, after ignoring the nearly $2 billion in royalties that are already due or collected (see Pet. 21-22), respondent claims there are "significant uncertainties" associated with forecasting *future* "production volumes and commodity prices." Br. in Opp. 30. Respondent does not, however, offer any lower forecast, much less suggest that such a forecast would be more accurate than the ones made by the Department ($17.97 to $18.98 billion) and by the Government Accountability Office ($15.1 to $38.3 billion). See Pet. 22, 23 n.11.

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lems and did not involve amounts as enormous as the ones at issue here. See Br. in Opp. at 8, 11-12, *California Fed. Bank, FSB* v. *United States*, 546 U.S. 817 (2005) (No. 04-1557) (petitioner sought vacatur to allow Federal Circuit to resolve alleged intra-circuit split about whether flotation costs of $955 million should be added to damages award); Br. in Opp. at 8, 9, *McDonnell Douglas Corp.* v. *United States*, 529 U.S. 1097 (2000) (No. 99-1258) ($1.2 billion judgment; government opposed certiorari on ground that judgment was interlocutory); Pet. App. at 4a and Br. in Opp. at 16 n.14, *Exxon Corp.* v. *United States*, 474 U.S. 1105 (1986) (No. 85-429) ($1.64 billion judgment; government also noted that petitioner's constitutional arguments had not been advanced until its rehearing petition in the court of appeals). Moreover, this Court has in fact granted certiorari when the government could be held liable for large sums. See, *e.g.*, *United States* v. *Mitchell*, 463 U.S. 206, 211 & n.7 (1983) ($100 million).

Third, respondent claims (Br. in Opp. 30-31) that the government has already received "many offsetting benefits" from the RRA. But those benefits resulted from competitive bids for leases that contained price thresholds. Items like upfront bonuses to the government were presumably smaller than they would have been if the thresholds respondent now seeks to invalidate had not existed.

Finally, respondent claims (Br. in Opp. 31) that the amount of money at stake is smaller than it would have been had the Department sought this Court's reversal of an earlier loss "of up to $10 billion" or had it not inadvertently failed to include price thresholds in leases issued in 1998 and 1999. The figure respondent cites, however, was a "high case" estimate of loss that would occur only if the government also lost this case. 72 Fed. Reg. 72,654 (2007). The prior case alone was associated with a "low case" estimate of $3 billion. *Ibid.* In any event, there is no reason why the government's decision to be "out for a penny" in an earlier case compels it to remain "out for a pound" in this one.

Thus, respondent's quibbles do not alter the reality that this case does indeed involve an enormous sum of federal revenue.

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

ELENA KAGAN
Solicitor General

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